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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

No. _____

MARILYN WHEELER, Petitioner,

v.

MAIN HURDMAN, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR THE TENTH CIRCUIT

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October 23, 1987

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PETITION FOR A WRIT OF CERTIORARI TO
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The Petitioner Marilyn Wheeler respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on July 27, 1987.

THE QUESTIONS PRESENTED FOR REVIEW.

A. Can a person who is a partner pursuant to state law be an employee for purposes of the Equal Employment Opportunity Act, the Equal Pay Act, or the Age Discrimination in Employment Act?

B. Does the fact that a partner has a minute proportionate share of the partnership's unlimited liability [fifty-eight/one-millionths] preclude that partner from being an employee for purposes of federal employment law?

C. Is an "economic realities" test a proper method to determine whether a partner pursuant to State law is an employee for purposes of federal employment law?

D. Is a "control" test a proper method to determine whether a partner pursuant to State law is an employee for purposes of federal employment law?

PARTIES TO THE CASE BELOW

The parties to the case below are the plaintiff, Marilyn Wheeler, an individual, and the defendant, Main Hurdman, a firm of certified public accountants. The Equal Employment Opportunity Commission briefed and argued *amicus curiae* . The American Association of Retired Persons filed briefs *amicus curiae*.

TABLE OF CONTENTS

THE QUESTIONS PRESENTED FOR REVIEW..... 1

PARTIES TO THE CASE BELOW..... 2

CITATIONS TO THE CASE BELOW..... 6

JURISDICTION..... 6

STATUTORY PROVISIONS INVOLVED..... 6

STATEMENT OF THE CASE..... 11

BASES OF JURISDICTION BELOW..... 13

REASONS FOR GRANTING THE WRIT..... 13

CONCLUSION..... 18

APPENDIX 1. Wheeler v. Main Hurdman, Opinion of the Tenth Circuit..... 1-1

APPENDIX 2. Wheeler v. Main Hurdman, Order of August 13, 1985..... 2-1

APPENDIX 2A. Wheeler v. Main Hurdman, Order of September 17, 1985..... 2A-1

APPENDIX 3. Wheeler v. Main Hurdman, Complaint 3-1

APPENDIX 4. Affidavit of Richard L. West 4-1

APPENDIX 5. Affidavit of Marilyn Wheeler 5-1

CASES

Burke v. Friedman, 559 F.2d 867, (7th Cir., 1977) 15

Caruso v, Peat Marwick Mitchell & Company, 644 F. Supp. 144 (S.D.N.Y. 1987)..... 15, 16, 18

EEOC v. Peat Marwick and Mitchell, 775 F.2d 928, (8th Cir., 1985)..... 15, 16

EEOC v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975)..... 15, 16

Hishon v. King & Spaulding, 467 U.S. 69, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1985)..... 6, 15, 16

Hishon v. King & Spaulding, 678 F.2d 1102 (11th Cir. 1982)..... 15

Holland v. Ernst & Whinney, 35 Emp. Prac. Dec. p. 34.653 (N.D. Ala., August 17, 1984)..... 15, 16

Hyland v. New Haven Radiology Associates, 606 F.Supp. 617 (D. Conn. 1985)..... 15, 17

Hyland v. New Haven Radiology Associates, 794 F.2d 793 (2d Cir. 1986)..... 15, 17, 18

Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y., 1977)..... 15

Maher v. Price Waterhouse, Civ. No. 84-1522 C (2) (E.D. Mo. 4/8/85)..... 15, 16

Wheeler v. Main Hurdman, 825 F. 2d 257 (10th Cir. 1987)..... 17

STATUTES

28 U.S.C. 1292 (b)..... 13

28 U.S.C. 1331..... 13

28 U.S.C. 1337..... 13

28 USC 1254 (1)..... 6

29 U.S.C. 216(b)..... 13

29 U.S.C. 623(a)..... 13

29 USC 203..... 6

42 USC 2000e..... 6, 13

RULES

Rule 17 (c)..... 13

Rule 17(a)..... 13

OTHER AUTHORITIES

Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 5, 947 (1982)..... 14

Bernstein, *ADEA Implications of Hishon*, 1 The Labor Lawyer 519 (Summer 1985)..... 14

Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 Wm. & Mary L. Rev. 75 (1984)..... 14

Newcomb, *Hishon v. King & Spaulding: Discrimination in Professional Partnerships*, 62 Den. U.L. Rev. 2, 485 (1985)..... 14

Note, *Civil Rights: Law Partners as Employees for Title VII Purposes?*, 35 U. Fla. L. Rev. 201, (1983)..... 14

Note, *Hishon v. King & Spaulding: Implication for Private Partnership*, 14 Cap. U.L. Rev. 151 (1984)..... 14

Note, *EEOC Subpoena Enforcement to Determine ADEA Coverage of Partnership Retirement Policy - EEOC v. Peat Marwick Mitchell & Co.*, 19 Creighton L. Rev. 967 (1986)..... 15

Note, *Tenure and Partnership as Title VII Remedies*, 94 Harv. L. Rev. 2, 457 (1980)..... 15

Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 Mich. L. Rev. 282 (1977)..... 15

Note, *The Application of Title VII to Law Firm Partnership Decisions: Women Struggle to Join the Clubs*, 44 Ohio St. L.J. 841 (1983)..... 15

Note, *The Age Discrimination in Employment Act and Mandatory Retirement of Law Firm Partners*, 53 S. Cal. L. Rev. 1679 (1980)..... 15

Statistical Abstract of the U.S. 14

CITATIONS TO THE CASE BELOW

The case below is reported at 825 F.2d 247 (10th Cir. 1987). The District Court orders of August 13, 1985, and of September 17, 1985, are unreported and appear at Appendix 2 and 2A.

JURISDICTION

Judgment was entered by the Court of Appeals for the Tenth Circuit on July 27, 1987. There has been no petition for rehearing or request for extension of time. This petition is filed within ninety days of the judgment and order appealed. Jurisdiction is invoked pursuant to 28 USC 1254 (1).

STATUTORY PROVISIONS INVOLVED

The Equal Employment Opportunity Act, 42 USC 2000e:

> (b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person... .
>
> * * * * *
>
> (f) The term 'employee' means an individual employed by an employer... .

The Fair Labor Standards Act, 29 USC 203:

> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.
>
> (e)(1) [T]he term "employee" means any individual employed by an employer.

STATEMENT OF THE CASE

This Petition presents the question which was implicit within but not reached in *Hishon v. King & Spaulding* , 467 U.S. 69, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1985). In *Hishon* the Court considered whether a promise for consideration for partnership

constituted a "term or condition" of employment which must be accorded to an employee without regard to race, sex, age, creed, or religion. The Court expressly reserved and did not consider what was to happen to Elizabeth Hishon if the partnership voted to expel her the morning after she was made partner. *Wheeler v. Main Hurdman* precisely presents the question which was reserved in *Hishon*. The issues are whether the federal antidiscrimination in employment statutes apply to the conduct of a partnership in relation to a partner, and, if so when.

The Wheeler complaint [Appendix 3] states that plaintiff had been "employed...as a partner" by the defendant Main Hurdman (Complaint, Paragraph 9), that Main Hurdman was a partnership (Complaint, Paragraph 2), and that plaintiff was discriminated against and eventually terminated in violation of Title VII of the Civil Rights Act of 1964 ("EEOA") (42 U.S.C. 2000 *et seq*), in violation of the Equal Pay Act ("EPA") (29 U.S.C. 200 *et seq*) and in violation of the Age Discrimination in Employment Act of 1967 ("ADEA") (29 U.S.C. 623 *et seq*) (Complaint, *passim.*)

The order appealed to the Tenth Circuit arises from a ruling on the Defendant's Motion to Dismiss for failure to state a claim and the Plaintiff's cross-motion for partial summary judgment on the issue of employment.[1]

The partnership agreement was not introduced. The relevant terms appear in affidavits from each party.[2] Main Hurdman supported its Motion to Dismiss with an affidavit [Appendix 4] describing specific aspects of the partnership agreement and stating that the Wheeler/Main Hurdman relationship evidenced certain

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1. The Defendants' motion was supported by affidavits and went to the jurisdictional issue. It was converted to a motion for summary judgment. Plaintiff filed a cross motion for summary judgment on the issue of employment status.

2. The entire factual record is in the Appendix. It consists of the complaint [Appendix 3], the West Affidavit filed by defendants [Appendix 4] and the Wheeler Affidavit filed by plaintiff [Appendix 5].

"traditional"[3] indicia of partnership. Plaintiff responded with an affidavit [Appendix 5] which set forth additional information about the Wheeler/Main Hurdman relationship and particularly addressed four factors:

(1) Main Hurdman had the power to hire and fire.

(2) Main Hurdman supervised and controlled Wheeler's work schedules and conditions of employment.

(3) Main Hurdman determined Wheeler's rates and method of payment.

(4) Main Hurdman maintained employment records.

The Wheeler and West Affidavits are in agreement as to the material facts.[4] There is no factual dispute that the partnership is valid as a matter of State law.[5] The dispute is strictly whether the relationship between Wheeler and Hurdman can be a federal employment relationship whether or not the partnership is valid as a matter of state law.

Main Hurdman argued that Marilyn Wheeler as a "partner" in Main Hurdman could not be an employee under the statutes as a matter of law. Wheeler asserted that regardless of partnership she was still an "employee" for federal law purposes. Petitioner's contention is that the vagaries and eccentricities of individual state statutes and case law do not control federal antidiscrimination employment law.

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3. The word "traditional" is used advisedly. "Common law" raises the question: Common law of what State? Pennsylvania, urged by the Defendants, specifically authorizes an elective partnership to employ partners as employees. 59 Pa. C.S.A. 706 (Supplement).

4. The affiants disagree whether Ms. Wheeler was able to sign tax returns on behalf of the partnership prior to becoming a partner and whether she was reimbursed for professional organization dues. As to both counts, she says she was. Since the case arises on Defendant's motion the facts must be construed in the light most favorable to Ms. Wheeler.

5. The record does not establish which State's law created this partnership. In their brief to the Tenth Circuit the Defendants argued that the partnership is a Pennsylvania partnership. Petitioner takes no position as to which State's law applies.

The District Court held that Marilyn Wheeler *was* an employee of Main Hurdman for purposes of the federal antidiscrimination statutes. [Appendix 2.]

An excerpt of the facts as characterized by the Court of Appeals follows. Petitioner's additions and comments appear in brackets.

> Wheeler's credentials, including professional activities and affiliations, are substantial. Her employment experience with Main Hurdman was characterized by steady advancement as an employee-accountant. She was made a partner of Main Hurdman in April 1982. At that time approximately 14% or 502 of Main Hurdman's 3570 personnel were partners.
>
> Partnership consisted at least of the following: election to the partnership and execution of the Firm's partnership agreement;[6] change in compensation from salary to a share of the Firm's profits, paid by draw and an allocation of profits based on points; a contribution to capital; establishment of a capital account; assumption of a proportionate share of unlimited personal liability for the debts and obligations of the partnership; rights under the partnership agreement to vote on such matters as amendment of the partnership agreement, approval of mergers with other accounting firms of a certain size, admission of new partners, termination of a partner's interest, approval of draws, shares of net profits, special distributions, and any other income to be allocated to any partners, and dissolution of the firm. In addition, Wheeler became eligible for certain rights and privileges which were enjoyed only by partners of the Firm, such as the right to sign audit reports and tax returns and the right to be reimbursed

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6. [Footnote in the original opinion.] The partnership agreement is not included in the record, but various of its terms are referred to by the parties in their affidavits, and are argued at length in the briefs.

for membership dues in certain clubs;[7] and, she was subject to involuntary termination of her interest in the partnership only by either: (1) a unanimous vote of the firm's policy board, or (2) an affirmative vote of no less than 75% of the members of the Firm's advisory board, or (3) an affirmative vote of no less than 75% of all partners casting votes. [B]y becoming a partner Wheeler surrendered certain employee benefits including prepaid health insurance and life insurance.

[U]nder laws governing partnerships Wheeler was a bona fide and general partner of Main Hurdman. [Wheeler] concede[s] that Main Hurdman is a bona fide general partnership. [Although it is conceded that the facts relating to Wheeler's admission to partnership have legal substance as a matter of state law, it is not conceded that the State law created partnership relation controls the definition of"employee" for federal employment law purposes.]

[Wheeler points to] other facts which [she] contend[s] portray the economic reality of employee status co-existing with partner status. After being made a partner Wheeler's work remained unchanged. She had the same client load, same duties and responsibilities, same support staff, and was supervised in her work and work assignments, by the same department head. A personnel file was maintained with respect to her and all other personnel, including partners. The amounts charged for her services were established by managing partners. The number of partnership points allocated to her for income purposes was, as a practical matter, determined by the managing partner of her office.[8] Also as a practical matter, a recommendation by the same

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7. [Footnote in the original opinion.] [T]here is a conflict in the Affidavits on these particulars. Wheeler asserts that she signed tax returns and was reimbursed for certain club dues while still an employee. [Given the posture of the case, this factual dispute must be resolved in Wheeler's favor.]

8. [Footnote in the original opinion.] With respect to compensation, partners received a guaranteed draw plus an allocation of

(Footnote 8 continued on following page)

managing partner that she or any other partner of that office be expelled from the partnership was the final word, since such recommendations, according to Wheeler, were routinely adopted and appeals of such decision pursuant to terms of the partnership agreement were unavailing. Wheeler Aff. para. 14.

Main Hurdman is a large firm, with eighty offices nationwide. [It is] a highly organized, centrally managed, business institution of indefinite and ongoing duration; in other words, it looks like a corporation. The operating structure of the partnership, within which Wheeler functioned, is set forth on an exhibit to Wheeler's Affidavit in the district court. That exhibit shows the partners of Main Hurdman as the governing body, below which is a policy board and an advisory board to which partners are elected. Below those two boards there is a managing partner/CEO and a chairman who, presumably, are responsible for the day-to-day operations of the partnership. Thereafter, there appears on the organization chart a myriad of assignments, including international, marketing, human resources, management consulting, professional standards, tax services, finance, and so on. The chart also shows a partner in charge of operations and under that partner six geographical regions with a partner in charge of each. Within each region the location of Main Hurdman offices is identified, with a local "partner in charge" of each office. The local partner in charge oversees assignment of department heads, allocation of partner credit

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(Footnote 8 continued from previous page)

profits. The profits are allocated through a process of point distribution. The managing partner and policy board first decide on the amount of points to be allocated to each local office; this decision is ratified by the partners at the annual meeting. The regional or local partner-in-charge then allocates points to each individual partner, in part according to the number of clients he or she managed. The allocation of points to individuals is not reviewed by other partners. Therefore according to Wheeler, "the local partner-in-charge has direct control over the amount of compensation to be paid ... to 'partners'". Wheeler Aff. para. 11.

for client hours managed, the establishment of performance goals for all personnel, assignment of CPAs to clients, the amount to be charged for services, and the hours, dates and places when and where work is to be performed. It is contended that although each partner is entitled to vote at annual or special meetings the votes are primarily for the purpose of ratifying decisions made by the managing partner, policy board or "nominating" committee.

Finally,...as a partner Wheeler's initial contribution to capital was just $4,000, representing only a .000058 [fifty-eight/one millionths] share of the Firm's total capital account.[9] [T]hirteen months later Wheeler signed a letter of "withdrawal" from the partnership in which reference was made to her capital account containing a minimum of $15,000 plus an unspecified additional balance, plus additional profit allocations to be determined twelve months from the date of termination — all of which was to be paid to Wheeler as a terminating general partner.[10] West Aff., Ex. B. [Sentence omitted.]

In April, 1983, one year after being made partner, Wheeler was informed by Richard West, Manager of the Denver office, that she would be severed from the Firm as of September 30 of that year. A letter of "withdrawal" signed by West and Wheeler set forth certain financial and other terms relating to the severance... . Following expulsion, Wheeler filed, in January 1985, a charge of discrimination with the

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9. [Footnote in the original opinion.] There is a factual dispute on the question of capital contribution which we do not pursue, given the applicable standard of review here.

10. [The reasons for growth in Wheeler's capital account are not in the record. The relevance of this fact, isolated by the Court of Appeals, is dubious. If, as seems likely, the growth was proportionate to the growth of the firm, then her share was still only .000058. Alternatively, assuming the total capital account stayed constant—an unwarranted assumption—a $15,000 capital account would increase Wheeler's proportion share to .000219 share, or two hundred nineteen/one millionths, still an infinitesimal share.]

EEOC. On October 22, 1985, the EEOC issued to Wheeler a Notice of Right to Sue. This suit, filed on January 22, 1985, followed. [End of excerpt.]

Marilyn Wheeler enjoyed a protected employment status comparable to Elizabeth Hishon's for a period of nine years. One day in April of 1982 she was "promoted" to partner. Slightly more than a year later she was terminated discriminatorily on the basis of sex and age. If the opinion of the Tenth Circuit stands, then simply by being named "partner" she lost protections of the antidiscrimination statutes which previously applied.

BASES OF JURISDICTION BELOW

The Complaint in the District Court asserted jurisdiction pursuant to Title VII of the Civil Rights Act of 1964 42 U.S.C. 2000(e)-5(f)(3); 28 U.S.C. 1331; 29 U.S.C. 216(b); 28 U.S.C. 1337; 29 U.S.C. 623(a); and 28 U.S.C. 1337.

Appeal by Defendant [Respondent here] was brought in the Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. 1292 (b).

REASONS FOR GRANTING THE WRIT

1. In the decision below the Court of Appeals for the Tenth Circuit has decided an important question of law which has not been, but should be, settled by this Court. [Rule 17 (c)].

2. The Court of Appeals for the Tenth Circuit has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter. [Rule 17(a)]. [11]

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11. Petitioner relies primarily on Rule 17(c), and most of the discussion which follows focuses on the "important question of federal law" which requires this Court's attention. The conflicts between the circuits are inferential rather than direct, and thus Petitioner places secondary reliance on Rule 17(a).

Implicit in the discussion of Rule 17 (c) is a discussion of the variety of approaches different Courts of Appeal have taken to cases which address the interface between the federal law definition of "employee" for purposes of the antidiscrimination statutes and state law status definitions "partner" which treat an individual as a "non-employee" for purposes of State law.

The conflict occurs between the cases of the Eighth, Tenth and Second Circuits who seem to hold that Courts will look behind the state law label and the Seventh and Eleventh Circuits who hold that they will not.

This case presents two important federal questions which will continue to arise until resolved by this Court: (1) Can a partner in a partnership which is valid as a matter of state law *ever* be an employee for purposes of federal employment statutes? (2) Can a consistent test—independent of state law eccentricities—be applied to determine the status of "employee" for purposes of federal employment laws?

The narrow question—whether a partner in a large, perhaps multi-state or multi-national partnership, composed of tens or hundreds of partners—is ever an employee for purposes of federal antidiscrimination statutes is arising with increasing frequency.

A burgeoning interest in this question may be attributed to the increasing number of individuals who are active in partnerships and the increasing number of women who are becoming accountants or lawyers. As the Court below noted (825 F.2d at 266, footnotes 17 and 18) the Statistical Abstract shows total United States partnerships in the service area growing from 239,000 in 1979 to 306,000 in 1983. Bureau of Census, U.S. Dept. of Commerce, Statistical Abstract of the U.S., 506 (107th ed. 1987) [hereinafter Statistical Abstract]. Lawyers practicing as partners grew from 92,442 in 1970 to 190,187 in 1980. Statistical Abstract at 167 (107th ed. 1987). In 1960 17% of all accountants were women; by 1985, 44% of all accountants were women. Statistical Abstracts at 361-63 (96th ed. 1975); Statistical Abstracts at 385 (107th ed. 1987). Only 230 law degrees were conferred upon women in 1960, comprising 2.5% of the total; in 1984 13,630 degrees were conferred on women, 36.8% of the total. Statistical Abstract at 148 (107th ed. 1987).[12]

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12. Commentators are avidly interested as well. *See* for example: Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 5, 947 (1982); Bernstein, *ADEA Implications of Hishon*, 1 The Labor Lawyer 519 (Summer 1985); Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 Wm. & Mary L. Rev. 75 (1984); Newcomb, *Hishon v. King & Spaulding: Discrimination in Professional Partnerships*, 62 Den. U.L. Rev. 2, 485 (1985); Note, *Civil Rights: Law Partners as Employees for Title VII Purposes*, 35 U. Fla. L. Rev. 201, (1983); Note, *Hishon v. King & Spaulding: Implication for Private Partnership* , 14 Cap.

(Footnote 12 continued on following page)

In the 1970's and 1980's the question whether a "partner" can be an "employee" has been raised and argued in the following cases (the list is not intended to be all-inclusive): *Hishon v. King & Spaulding*, 678 F.2d 1102 (11th Cir. 1982) rev'd on a narrower holding, 467 U.S. 69, 81 L.Ed 2d 59, 104 S.Ct. 2229 (1985); *Burke v. Friedman*, 559 F.2d 867, (7th Cir., 1977); *EEOC v. Peat Marwick and Mitchell*, 775 F.2d 928, (8th Cir., 1985); *Holland v. Ernst & Whinney*, 35 Emp. Prac. Dec. p. 34.653 (N.D. Ala., August 17, 1984); *Hyland v. New Haven Radiology Associates* , 606 F.Supp. 617 (D. Conn. 1985) [Partner held to be non-employee, the Court of appeals reversed holding no partnership existed] 794 F.2d 793 (2nd Cir., 1986); *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y., 1977) [Conditions of employment prior to partnership.]; *EEOC v. Rinella & Rinella*, 401 F. Supp. 175 (N.D. Ill. 1975) [Professional status prior to partnership.]; *Caruso v. Peat Marwick Mitchell & Company*, 644 F. Supp. 144 (S.D.N.Y. 1987); and *Maher v. Price Waterhouse*, Civ. No. 84-1522 C (2) (E.D. Mo. 4/8/85);

A review of these cases shows, first, a disagreement whether the courts can even consider federal "employee" status when state law denominates a person "partner", and, second, an uncertainty what test courts should use to determine whether a federal "employee" status exists in the state law partnership relation.

The following cases refused to look behind the label "partner": *Hishon v. King & Spaulding*, 678 F.2d 1102 (11th Cir. 1982) ("[W]e do not ..exalt form over substance. [T]he form *is* the substance... ."); *Burke v. Friedman*, 559 F.2d 867, (7th Cir.,

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U.L. Rev. 151 (1984); Note, *EEOC Subpoena Enforcement to Determine ADEA Coverage of Partnership Retirement Policy - EEOC v. Peat Marwick Mitchell & Co.*, 19 Creighton L. Rev. 967 (1986); Note, *Tenure and Partnership as Title VII Remedies*, 94 Harv. L. Rev. 2, 457 (1980); Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 Mich. L. Rev. 282 (1977); Note, *The Application of Title VII to Law Firm Partnership Decisions: Women Struggle to Join the Clubs*, 44 Ohio St. L.J. 841 (1983); Note, *The Age Discrimination in Employment Act and Mandatory Retirement of Law Firm Partners*, 53 S. Cal. L. Rev. 1679 (1980).

1977) ("[W]e do not see how partners can be regarded as employees rather than employers... ."); *Holland v. Ernst & Whinney*, 35 Emp. Prac. Dec. p. 34.653 (N.D. Ala., August 17, 1984) ("He was the employer. He was a partner... ."); *EEOC v. Rinella & Rinella*, 401 F. Supp. 175 (N.D. Ill. 1975) ("Since the firm is not a partnership,...it is only reasonable to conclude that [the lawyers other than Samuel Rinella] are employed by the firm."); and *Maher v. Price Waterhouse*, Civ. No. 84-1522 C (2) (E.D. Mo. 4/8/85) (The *Maher* opinion discusses the Price Waterhouse partnership agreement, but does not consider whether Maher could be an "employee" for purposes of federal employment law and still be a partner for purposes of the agreement. The court treats the question as an "either/or" proposition. It does not indicate what factors are determinative of "non-employee" status.)

The following cases authorize the Court to look behind the label and consider whether a person may be an "employee" even though a "partner" as a matter of state law. However, these cases do not agree what Courts must look for in making this determination.

Hishon v. King & Spaulding, 467 U.S. 69, 81 L.Ed 2d 59, 104 S.Ct. 2229 (1985) (Powell, J., concurring. "[A]n employer may not evade the strictures of Title VII simply by labeling its employees as 'partners'." 467 U.S. at 79, footnote 2; and "The essence of the law partnership is the common conduct of a shared enterprise." *Id.*, at79-80. The test to determine when there is a mere "labeling" or when there is a bona fide "common conduct of a shared enterprise" is not spelled out.); *EEOC v. Peat Marwick and Mitchell*, 775 F.2d 928, (8th Cir., 1985) (The court holds that the EEOC *can* look behind the label. There is no indication what to look for.); *Caruso v. Peat Marwick Mitchell & Company*, 644 F. Supp. 144 (S.D.N.Y. 1987) ("[D]etermination of an individual's status as an employee or a partner...should...[consider] (1) The extent of the individual's ability to control and operate his business; (2) The extent to which an individual's compensation is calculated as a percentage of business profits; and (3) The extent of the individual's employment security.").

Some cases demonstrate the confusion of issues more graphically than others.

In *Hyland v. New Haven Radiology Associates,* 606 F.Supp. 617 (D. Conn. 1985), the District Court looked at the "economic realities", apparently using a *federal* test, to go behind the employer's *corporate* form. It held that despite the corporate form Hyland was a "partner" as a matter of law. Presumably applying Connecticut law the court held that because of *state* law status of "partner" Hyland could not be an "employee" for purposes of *federal* employment statutes. The Court of Appeals for the Second Circuit reversed, apparently agreeing that a *state* law partner cannot be an "employee" for *federal* employment law purposes, but holding that no partnership existed. 794 F.2d 793 (2d Cir. 1986).

In the case presented on this petition, *Wheeler v. Main Hurdman*, 825 F. 2d 257 (10th Cir. 1987), the Court suggests that it will go behind the "partner" label. The Court discusses the "economic realities" test and the "control" test and a hybrid test, but then focuses on a single and apparently determinative fact, and one which will apparently be determinative in every partnership and perhaps many nonpartnerships as well:

> The central problem with the approach by Wheeler and the EEOC, however, is that it either ignores or relegates to insignificance the economic reality of partnership status itself. We view that as a fatal flaw. Status as a general partner carries important economic reality as well. Employees do not assume the risks of loss and liabilities of their employers; partners do. It is no small thing to be exposed to unlimited liability, to be personally at risk for a partner's mistakes, and to have one's share of profits always potentially conditional upon the outcome of claims, suits, and obligations generated by another partner. [825 F.2d at 274]

While the *Wheeler* Court purports to be applying an "economic realities" test, it actually abandons the effort. The court holds that if an individual has an infinitesimal share of the partnership's liability he or she is *ipso facto* a non-employee. Ms. Wheeler's proportionate share of the "unlimited" liability is .000058 [fifty-eight/one millionths].

Wheeler should be contrasted with *Hyland, supra*, where the Second Circuit held that the radiologist/shareholder was not a "partner" and was therefore a corporate employee. The *Hyland* opinion is silent as to whether the shareholder was a guarantor of the four doctor corporation's credit with banks and suppliers, but, if this fact were shown, would it reverse the outcome again?

Wheeler should also be contrasted with *Caruso, supra*, who was found to be an employee of Peat Marwick & Mitchell [13] on an agreement which is identical to the agreement between Wheeler and Main Hurdman in every aspect identified as relevant by either court.

The questions raised by this case have not been resolved and will not be until this Court has spoken: If a partnership is valid as a matter of state law, does that fact foreclose questions of "employment" for federal antidiscrimination purposes? If a court does look into the terms of a valid partnership agreement, what factors determine "employee" status within the partnership?

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted this 23 day of October, 1987.

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13. Ironically Main Hurdman and Peat Marwick & Mitchell merged on April 1, 1987.

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARILYN WHEELER,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 85-2601
	)	
MAIN HURDMAN,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. NO. 85-C-163)

Tim Correll (Mark P. Field with him on the brief), The Correll Law Offices, P.C., Denver, Colorado, for Plaintiff-Appellee.

Jacques M. Wood, Berkman Ruslander Pohl Lieber & Engel (Jim Clark, Baker & Hostetler, George W. Mueller, Burns, Wall, Smith & Mueller, with him on the briefs), Denver, Colorado, for Defendant-Appellant.

Vella M. Fink (Johnny J. Butler and Gwendolyn Young Reams with her on the briefs), Washington, D.C., for Amicus Curiae Equal Employment Opportunity Commission.

Before BARRETT, LOGAN and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge.

Appendix 1

This appeal pursuant to 28 U.S.C. § 1292(b) presents a single substantive issue: whether federal antidiscrimination laws protecting employees applied to the plaintiff, Marilyn Wheeler, during the time she was a general partner of the accounting firm of Main Hurdman, a general partnership.

Marilyn Wheeler, a certified public accountant, was employed as an accountant by Main Hurdman, in progressively responsible positions, for nine years, following which she was made a partner in the firm. Seventeen months later, at age forty-seven, she was expelled from the firm. She sued Main Hurdman alleging that the partnership discriminated against her in compensation and work assignments, and expelled her because of her age or sex, in violation of: Title VII of the Civil Rights Act of 1964, ("Title VII") 42 U.S.C. §§ 2000e to 2000e-17; the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634; and the Equal Pay Act of 1963, 29 U.S.C. §§ 206(d), a subpart of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201-219.[1]

Main Hurdman moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b) and 12(h) (3), for want of subject matter jurisdiction. It alleged that Wheeler's complaint did not state a claim under Title VII, the ADEA, or the Equal Pay Act "because as a partner of the Firm she was not an employee" within the definitions of those Acts. The motion was treated as one for summary judgment by the district court because affidavits were submitted, and was denied. In its order denying the motion the district court concluded that although a partner, Wheeler was also an employee for purposes of each of the Acts. It stated that it was bound by *Goldberg v. Whitaker House Coop.*, 366 U.S. 28 (1961), to apply an "economic realities" test which, in turn, dictated the conclusion reached. The court then certified the question of coverage reached. The court then certified the question of coverage of the Acts for immediate appeal pursuant to 28 U.S.C. § 1292(b), as a

1. For convenience these statutes are sometimes collectively referred to herein as the Acts or the Antidiscrimination Acts, laws, or statutes.

controlling question of law as to which there is substantial ground for difference of opinion.[2] We reverse.

NATURE OF THE MOTION UNDER REVIEW

As a preliminary matter, this court must decide whether it was appropriate for the district court to "convert" the defendant's motion to dismiss into a motion for summary judgment.[3] Main Hurdman asserts that its motion was a Fed. R. Civ. P. 12(b) (1) motion to dismiss for lack of subject matter jurisdiction and that it was inappropriate to convert it into a motion for summary judgment absent notice to the parties.

The appellant's motion does appear to be a 12(b) (1) motion to dismiss for lack of subject matter jurisdiction.[4] As a general rule, a 12(b) (1) motion cannot be converted into a motion for summary judgment under Rule 56. *Nichols v. United States*, 796 F.2d 361, 366 (10th Cir. 1986) (quoting 5 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1366 (Supp. 1986)). *See also Crawford v. United States*, 796 F.2d 924 (7th Cir. 1986); *Stanley V. CIA*, 639 F.2d 1146, 1157-58 (5th Cir. Unit B Mar. 1981).[5]

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2. On appeal, the United States Equal Employment Opportunity Commission ("EEOC") was granted permission to appear as Amicus Curiae. It has filed a brief and orally argued the case.

3. The district court stated that "[b]ecause both parties have submitted affidavits in support of their positions, I will treat the defendant's motion as one for summary judgment under Fed. R. Civ. P. 56." *Wheeler v. Main Hurdman*, Civ. No. 85-C-163, slip. op. at 1 (D. Colo. Aug. 13, 1985).

4. Main Hurdman's Motion to Dismiss states: "[P]ursuant to Rules 12(b) and 12(h)(3) of the Federal Rules of Civil Procedure, [the defendant] moves this Court to dismiss the Complaint filed in this action for lack of subject matter jurisdiction...." Defendant's Motion to Dismiss at 1.

5. Unlike the strict limitations under 12(b)(6) against considering matters outside the complaint, a 12(b)(1) motion is considered a "speaking motion" and can include references to evidence extraneous to the complaint without converting it to a Rule 56 motion. *Crawford v. United States*, 796 F.2d 924 (7th Cir. 1986); *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986); *Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985); *Sun Valley Gas v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139 (9th Cir. 1983); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *Timberlane v. Bank of America*, 549 F.2d 597, 601-03 (9th Cir.
(Footnote 5 continued on following page)

There is, however, a widely recognized exception to this rule. If the jurisdictional question is intertwined with the merits of the case, the issue should be resolved under 12(b) (6) or Rule 56. *Timberlane v. Bank of America*, 749 F.2d 1378 (9th Cir. 1984) ("*Timberlane II*"); *Sun Valley Gas*, 711 F.2d at 139; *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 733 (11th Cir. 1982); *Black v. Payne*, 591 F.2d 83, 86 n.1 (9th Cir. 1979); *see also* J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 12.07[2.-1] at 12-51 (1986).

When subject matter jurisdiction is dependent upon the same statute which provides the substantive claim in the case, the jurisdictional claim and the merits are considered to be intertwined. *Clark v. Tarrant County*, 798 F.2d 736, 742 (5th Cir. 1986) (Title VII) (determination of whether defendant was an "employer"); *Timberlane II*, 749 F.2d at 1381-82; *Sun Valley Gas*, 711 F.2d at 139; *Timberlane I*, 549 F. 2d at 602; *McConnell v. Frank Howard Allen & Co.*, 574 F. Supp. 781. 783-84 (N.D. Cal. 1983). Courts have invoked this rule when subject matter jurisdiction has turned on whether a particular investment was a "security" under the federal securities statutes. *Odom v. Slavik*, 703 F.2d 212, 215-16 (6th Cir. 1983); *Mason v. Unkeless*, 618 F.2d 597, 598 (9th Cir. 1980); *Smith v. Gross*, 604 F.e2d 639, 641 (9th Cir. 1979); *Black v. Payne*, 591 F.2d 83 (9th Cir. 1979); *Roark v. Belvedere, Ltd.*, 633 F. Supp. 765, 770 (S.D. Ohio 1985); *McConnell*, 574 F. Supp. at 783-84.

(Footnote 5 continued from previous page)

1976) ("*Timberlane* I"). A court has wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts under 12(b)(1). Frequently, courts look to Rule 56 for guidance in ruling upon evidentiary matters under 12(b)(1). *Exchange Nat'l Bank v. Touche Ross & Co.*, 544 F.2d 1126, 1131 (2nd Cir. 1976). The primary difference is not in the procedures used but in the effect the ruling will have upon the parties: a dismissal under 12(b)(1) allows for the possibility of repleading the action to bring it within the subject matter jurisdiction of the court. A grant of summary judgment resolves the issue on the merits and thus is with prejudice. *Indium*, 781 F.2d at 883; J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 12.07 [2.-1] (1986).

We find that the determination of whether Wheeler qualifies as an employee under the federal discrimination statutes is both a jurisdictional question and an aspect of the substantive claim in her discrimination action. Since both parties have submitted additional evidence beyond the pleadings, and since the district court relied on this information, the motion was appropriately characterized as a motion for summary judgment.

Main Hurdman argues that it was not given the notice to which it was entitled prior to the court converting and ruling on the motion as a motion for summary judgment. The Tenth Circuit does require notice under such circumstances to prevent "unfair surprise." *Nichols*, 796 F.2d at 364. In this case, however, there is no unfair surprise. Both parties submitted material beyond the pleadings. We have previously held that when a party submits material beyond the pleadings in support of or opposing a motion to dismiss, the prior action on the part of the parties puts them on notice that the judge may treat the motion as a Rule 56 motion. *Id.* The fact that Main Hurdman characterizes its motion as a Rule 12(b) (1) motion does not change our analysis. Main Hurdman identified its motion only as a 12(b) motion without specifying a particular subsection. Although the motion was made on the ground that there was a lack of subject matter jurisdiction, it was also based on the ground that Wheeler "does not and cannot state a claim" upon which relief could be granted. Main Hurdman's Motion to Dismiss at ¶¶ 8, 10, 12. Under these circumstances, it was appropriate for the court to consider the motion as a motion in the alternative under 12(b) (1) and 12(b) (6) and to convert the motion to a Rule 56 motion when extraneous evidence was submitted in the form of affidavits by both parties. We find that it was not error for the district court to convert the motion and we will review it as a motion for summary judgment.

STANDARD OF REVIEW

In reviewing a district court's grant or denial of summary judgment, we apply a *de novo* standard of review to legal determinations. *See Carey v. United States Postal Serv.*, 812 F.2d 621, 623 (10th Cir. 1987); *see also Hydro Conduit Corp. v. American-First Title & Trust Co.*, 808 F.2d 712, 714 (10th Cir.

1986) ("When a district court has granted summary judgment, the court of appeals applies a de novo standard of review."); *Baker v. Penn Mutual Life Ins. Co.*, 788 F.2d 650, 653 (10th Cir. 1986); *Morgan v. Mobil Oil Corp.*, 726 F.2d 1474, 1477 (10th Cir. 1984). As for allegations of fact by the parties, the general rule is that our view of the facts must indulge all reasonable inferences in favor of the party opposing a motion for summary judgment. *Franks v. Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986); *Baker*, 788 F.2d at 653; *Lindley v. Amoco Prod. Co.* 639 F.2d 671, 672 (10th Cir. 1981). In this case, the essential facts governing our disposition on appeal (as opposed to how those facts are characterized or legal conclusions argued from them by the parties) are uncontested.

BACKGROUND

Wheeler's credentials, including professional activities and affiliations, are substantial. Her employment experience with Main Hurdman was characterized by steady advancement as an employee-accountant. She was made a partner of Main Hurdman in April 1982. At that time approximately 14%, or 502 of Main Hurdman's 3570 personnel were partners.

Partnership consisted at least of the following: election to the partnership and execution of the Firm's partnership agreement;[6] change in compensation from salary to a share of the Firm's profits, paid by draw and an allocation of profits based on points; a contribution to capital; establishment of a capital account; unlimited personal liability for the debts and obligations of the partnership; rights under the partnership agreement to vote on such matters as amendment of the partnership agreement, approval of mergers with other accounting firms of a certain size, admission of new partners, termination of a partner's interest, approval of draws, shares of net profits, special distributions, and any other income to be allocated to any partners, and dissolution of the firm. In addition, Wheeler became eligible for certain rights and privileges which were

6. The partnership agreement is not included in the record, but various of its terms are referred to by the parties in their affidavits, and are argued at length in the briefs.

enjoyed only by partners of the firm, such as the right to sign audit reports and tax returns and the right to be reimbursed for membership dues in certain clubs;[7] and, she was subject to involuntary termination of her interest in the partnership only by either: (1) a unanimous vote of the firm's policy board, or (2) an affirmative vote of no less than 75% of the members of the firm's advisory board, or (3) an affirmative vote of no less than 75% of all partners casting votes. Furthermore, by becoming a partner Wheeler surrendered certain employee benefits including prepaid health insurance and life insurance.

Wheeler and the EEOC effectively concede that under laws governing partnerships Wheeler was a bona fide and general partner of Main Hurdman. They similarly concede that Main Hurdman is a bona fide general partnership. It is undisputed that the foregoing facts relating to Wheeler's admission to partnership are not a sham, and have legal substance. Consonant with those facts, there is no allegation that Wheeler was made a partner, or denominated as such and was continued in that status, as a device for avoiding the Acts in question.

However, Wheeler and the EEOC, while not contesting Wheeler's partnership status, point to other facts which they contend portray the economic reality of employee status co-existing with partner status. After being made a partner Wheeler's work remained unchanged. She had the same client load, same duties and responsibilities, same support staff, and was supervised in her work and work assignments, by the same department head. A personnel file was maintained with respect to her and all other personnel, including partners. The amounts charged for her services were established by managing partners. The number of partnership points allocated to her for income purposes was, as a

7. There is a conflict in the affidavits on these particulars. Wheeler asserts that she signed tax returns and was reimbursed for certain club dues while still an employee.

practical matter, determined by the managing partner of her office.[8] Also as a practical matter, a recommendation by the same managing partner that she or any other partner of that office be expelled from the partnership was the final word, since such recommendations, according to Wheeler, were routinely adopted and appeals of such decisions pursuant to terms of the partnership agreement were unavailing. Wheeler Aff. para. 14.

Wheeler and the EEOC also emphasize that Main Hurdman is a large firm, with eighty offices nationwide. They portray it as a highly organized, centrally managed, business institution of indefinite and ongoing duration; in other words, it looks like a corporation. The operating structure of the partnership, within which Wheeler functioned, is set forth on an exhibit to Wheeler's affidavit in the district court. That exhibit shows the partners of Main Hurdman as the governing body, below which is a policy board and an advisory board to which partners are elected. Below those two boards there is a managing partner/CEO and a chairman who, presumably, are responsible for the day-to-day operations of the partnership. Thereafter, there appear on the organizational chart a myriad of assignments, including international, marketing, human resources, management consulting, professional standards, tax services, finance, and so on. The chart also shows a partner in charge of operations and under that partner six geographical regions with a partner in charge of each. Within each region the location of Main Hurdman offices is identified, with a local "partner in charge" of each office. The local partner in charge oversees assignment of department heads, allocation of partner

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8. With respect to compensation, partners received a guaranteed draw plus an allocation of profits. The profits are allocated through a process of point distribution. The managing partner and policy board first decide on the amount of points to be allocated to each local office; this decision is ratified by the partners at the annual meeting. The regional or local partner in charge then allocates points to each individual partner, in part according to the number of clients he or she managed. The allocation of points to individuals is not reviewed by other partners. Therefore, according to Wheeler, "the local partner in charge has direct control over the amount of compensation to be paid...to 'partners.'" Wheeler Aff. para. 11.

credit for clients hours managed, the establishment of performance goals for all personnel, assignment of CPAs to clients, the amount to be charged for services, and the hours, dates and places when and where work is to be performed. It is contended that although each partner is entitled to vote at annual or special meetings, the votes are primarily for the purpose of ratifying decisions made by the managing partner, policy board or "nominating" committee.

Finally, Wheeler and the EEOC make much of the fact that as a partner Wheeler's initial contribution to capital was just $4,000, representing only a .000058 share of the firm's total capital account.[9] It is also a fact, however, that thirteen months later Wheeler signed a letter of "withdrawal" from the partnership in which reference was made to her capital account containing a minimum of $15,000 plus an unspecified additional balance, plus additional profit allocations to be determined twelve months from the date of termination — all of which was to be paid to Wheeler as a terminating general partner. West Aff., Ex. B. Thus, whatever the true percentage of Wheeler's partnership interest, it translated into sums of money which were not insignificant.

In April 1983, one year after being made a partner, Wheeler was informed by Richard West, Manager of the Denver office, that she would be severed from the Firm as of September 30 of that year. A letter of "withdrawal" signed by West and Wheeler set forth certain financial and other terms relating to the severance, all of which apparently were honored by the parties. Official severance occurred on September 30, 1983. Following expulsion, Wheeler filed, in January 1984, a charge of discrimination with the EEOC. On October 22, 1984, the EEOC issued to Wheeler a Notice of Right to Sue. This suit, filed on January 22, 1985, followed.

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9. There is a factual dispute on the question of capital contribution which we do not pursue, given the applicable standard of review here.

I.
GENERAL STANDARDS GOVERNING REVIEW OF ANTIDISCRIMINATION ACTS

In our review of the antidiscrimination laws we must be mindful of their remedial purposes, and liberally interpret their provisions to that end. *Martinez v. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984) (Title VII) (quoting *Davis v. Valley Distributing Co.*, 522 F.2d 827, 832 (9th Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977)); *see also Owens v. Rush*, 636 F.2d 283, 287 (10th Cir. 1980) (Title VII). Such interpretation, however, cannot be used as a justification for rewriting the statutes. Legislative ends are circumscribed by statutory means. Thus, while the case before us deals with a charge of discrimination, the root of our inquiry is one of statutory interpretation.

II.
PARTNER AS COVERED EMPLOYEE UNDER THE ANTIDISCRIMINATION ACTS

A. *The Controlling Statutory Language.*

Title VII provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). The language of the ADEA is nearly identical.[10] The Equal Pay Act of the FLSA, 29 U.S.C. § 206(d)(1) provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

The statutory definition of employee under each of these Acts is virtually identical,[11] and circular in its description. Title VII defines employee as "an individual employed by an employer." It defines employer as "a person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000 e(b). The ADEA definition is identical except that it requires an employer to employ twenty or more employees. *See* 29 U.S.C. § 630(b). The definition of employer under the FLSA is equally

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10. 29 U.S.C. § 623(a) provides

> It shall be unlawful for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

11. There are only minor variations among the statutes. *See* 42 U.S.C. § 2000e(f) (Title VII) ("an individual employed by an employer"); 29 U.S.C. § 630(f) (ADEA) ("an individual employed by any employer"); 29 U.S.C. § 203(e)(1) (FLSA) ("any individual employed by an employer").

circular: "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). Under each act, a "person" is defined to include partnerships. 29 U.S.C. § 203(a); 29 U.S.C. § 630(a); 42 U.S.C. § 2000e(a).[12]

All parties acknowledge that nothing in the legislative history of these Acts explicitly addresses the definition of employee.[13] In general, cases construing definitions of one of the Acts are to be viewed as persuasive authority when interpreting the others. *See Lorillard v. Pons*, 434 U.S. 575 (1978); *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793 (2nd Cir. 1986).

B. ***Judicial and Agency Postures.***

1. *Judicial Interpretation.*

To date, courts have shown no disposition to extend these statutory employee protections to general partners.[14] The most

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12. There is no dispute that Main Hurdman is an employer under the Acts.

13. Senator Hugo Black stated during debates on the FLSA that the term "employee" in the Act was given the "broadest definition that has ever been included in any one Act." (81 Cong. Rec. 7657 (1983) (quoted in *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945). During the Senate debate on Title VII, Senator Joseph Clark of Pennsylvania stated that the term "employer" was "intended to have its common dictionary meaning except as qualified by the Act." 110 Cong. Rec. 7216 (daily ed., Apr. 8, (1964). In *Hishon v. King & Spaulding*, 467 U.S. 69 (1984), the Supreme Court referred to Senator Cotton's colorful comment that selecting a partner was like selecting a spouse. The Court observed that "it is unclear to what extent Congress shared his concerns about selecting partners" but "[i]n any event, his views hardly conflict with our narrow holding today. . . ." *Id.* at 78-79 n.10.

14. Both Wheeler and the EEOC place heavy reliance on *EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 929 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1263 (1986). We do not read similar import and meaning into that decision. The holding permitted enforcement of an EEOC subpoena issued to a partnership to investigate whether partners were employees for purposes of the ADEA. But the court was obviously focusing on the preliminary and procedural, not substantive, aspects of the matter. The law being examined was that pertaining to subpoena enforcement, not the ADEA. The court made clear that: "It can no longer be disputed that 'a

(Footnote 14 continued on following page)

widely recognized recent case is *Hishon v. King & Spaulding*, 678 F.2d 1022 (11th Cir. 1982), *rev'd on other grounds*, 467 U.S. 69 (1984). That case involved a Title VII claim asserted by a female lawyer-associate with respect to her firm's alleged refusal to consider her for partnership. In reversing the Eleventh Circuit the Supreme Court concluded "that in appropriate circumstances partnership consideration may qualify as a term, condition, or privilege of a person's employment" for purposes of Title VII coverage. *Hishon*, 467 U.S. at 78 n.10. However, the Court did not reach the question of application of Title VII to partners themselves. Thus, the views of the Eleventh Circuit on that subject remain as stated in its opinion in *Hishon*. There, the circuit court expressed reluctance to equate partners with employees, stating "the partners own the partnership; they are not its 'employees' under Title VII. We find a clear distinction between employees of a corporation and partners of a law firm." *Hishon*, 678 F.2d at 1028.

The Seventh Circuit expressed similar views in *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977), which involved an accounting firm. The question in *Burke* was whether individual partners of the partnership could be counted as employees for purposes of the fifteen-employee minimum for Title VII coverage. The Seventh Circuit held they could not, under the facts of that case. In reaching its holding, the court said:

> Partners manage and control the business and share in the profits and losses. *See Commissioner of Internal Revenue v. Tower*, 327 U.S. 280, 66 S. Ct. 532, 90 L.Ed. 670 (1946); *Wilson v. Commissioner of Internal Revenue*, 161 F.2d 661, 664 (7th Cir. 1947). In light of the foregoing, we do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business
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> * * *

(Footnote 14 continued from previous page)
subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular federal statute.'" *Id.* at 930 (quoting *Donovan v. Shaw*, 668 F.2d 985, 989 (8th Cir. 1982)).

> [Section] 2000e(f) does not expand the definition of employee to include a partner.

Id. at 869-70 (footnote omitted).

The reasoning in *Burke* was reconfirmed by an en banc panel of the Seventh Circuit in 1984 in *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984). In *Dowd*, it was held that lawyer/shareholders of a professional corporation were not employees for purposes of Title VII coverage because they were, in essence, partners in a partnership. Within the past year the Second Circuit has taken an opposite view with respect to professional corporations, holding that radiologist/shareholders in a professional corporation were employees of the corporation, rather than partners, for purposes of ADEA coverage. *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793 (2nd Cir. 1986). *See also Reiver v. Murdoch & Walsh*, 625 F. Supp. 998 (D. Del. 1985). But the Second Circuit stressed the importance of the chosen form of business entity, stating: "While those who own shares in a corporation may or may not be employees, they cannot under any circumstances be partners in the same enterprise because the roles are mutually exclusive." *Id.* at 798. As to partnerships themselves the court stated:

> It is generally accepted that the benefits of the antidiscrimination statutes...do not extend to those who properly are classified as partners.
>
> * * *
>
> The fact that certain modern partnerships and corporations are practically indistinguishable in structure and operation, however, is no reason for ignoring a form of business organization freely chosen and established.

Id. at 797-98.

Two federal district courts have recently held that partners are not employees for purposes of the ADEA. *Maher V. Price Waterhouse*, Civ. No. 84-1522 C (2) (E.D. Mo. April 8, 1985); *Holland v. Ernst & Whinney*, 35 Empl. Prac. Dec. (CCH) ¶ 34,653 (N.D. Ala. August 17, 1984). Both cases involved partners in "Big Eight" accounting firms.

Finally, in his much-quoted concurring opinion in *Hishon*, Justice Powell stated:

> I write to make clear my understanding that the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners. The reasoning of the Court's opinion does not require that the relationship among partners be characterized as an 'employment' relationship to which Title VII would apply.

467 U.S. at 79. The significance of Justice Powell's observation must, of course, be tempered by the fact that no other justice joined the concurring opinion, and by allusions to a highly interactive partnership characterized by common agreement or consent among the partners.

2. *Agency Interpretation.*

Turning from cases to the question of relevant agency interpretation of these Acts we are aided but little. The EEOC refers us to no directly relevant published agency positions regarding the ADEA and FLSA. Two references, twenty years apart, are cited pertaining to Title VII coverage of partners. Both sides rely on them. The first is a 1965 General Counsel opinion letter, which the Commission apparently cannot find, Brief of EEOC at 24 n.20, but which is asserted by Main Hurdman to rule that partners of a law firm may not be employees. In support of its view, Main Hurdman refers to a listing of the opinion published in a quarterly digest, "Digest of Legal Interpretations Issued or Adopted by the Commission," October 9, 1965 through December 31, 1965, § I(B)(6) at 2-3. In contrast, the EEOC refers to the annual Digest listing of the same opinion, which states that although the specific ruling found that partners were not employees, "the determination of whether partners of the [law] firm are 'employees' within the meaning of Title VII must be determined on a case-by-case basis." EEOC, First Annual Digest of Legal Interpretations, July 2, 1965 through July 1, 1966, § I(B)(5) at 6. Neither reference is sufficiently explanatory to be helpful; they are so scanty and open to argument in almost every respect that they fall short of agency interpretation which guides us.

The second and only other reference on point given to us by the EEOC is a 1985 EEOC decision that partners in an eight-partner, twelve-employee law firm were *not* employees for Title VII purposes. EEOC Decision No. 85-4, 2 Empl. Prac. Guide (CCH) ¶ 6846 at 7040-41 (1985). The EEOC contends the decision is not inconsistent with its position that partners can be employees under Title VII, and that a case-by-case determination is required. Such argument is based on two considerations. First, a footnote in the decision refers to factors to be considered in determining whether an individual is a partner or an employee in a particular case. Second, the decision itself was based on its own facts. We do not view the decision, however, as squarely supporting the present EEOC position. The decision displays no agency inclination whatsoever to pursue an aggressive inquiry into whether or not, as a matter of economic reality, any of the partners involved in the case were dominated in their work, in management or control of partnership affairs, in decisions on sharing profits, or in any other respect. Yet that is the approach urged upon us by the EEOC in this case. In the 1985 decision all such factors were essentially decided by the Commission by reference to the written terms of the partnership agreement, with only a passing reference to an absence of evidence that the "business is carried out in any other way than as indicated in the partnership agreement." *Id.* at 7040. The accompanying footnote, emphasized here by the EEOC, refers first to Justice Powell's language in *Hishon* that "an employer may not evade the strictures of Title VII *simply by labeling* its employees as 'partners.'" *Id.* at 7041 n.4 (emphasis added). Following that quote the Commission states: "The Commission recognizes that there *may* be *a* case where an individual is called a partner, but who may really be an employee." *Id.* (emphasis added). Only then is there reference to factors which may be relevant in making such a determination. It is evident from both the language and tone of that

footnote that even as recently as 1985 the Commission did not envision the wholesale inquiries proposed here.[15]

It is apparent that the EEOC has not historically espoused the stand it takes here. To the contrary, for many years following its creation under Title VII in 1964, the Commission by its relative silence and inaction, and its approach to the issue when raised, made it seem likely that it doubted any general coverage of partners by Title VII, excluding obvious sham situations. Thus, we accord less weight to the arguments of the EEOC in this case than if the Agency's position had been clearly developed proximate in time to passage of Title VII or to the transfer of responsibility for the ADEA and the Equal Pay Act from the Department of Labor to the EEOC in 1979, and consistently applied thereafter.

Although not one court has applied the Acts to a bona fide general partner against his or her partners or partnership, it is not surprising that Wheeler and the EEOC press the issue now. In recent years, literally dozens of articles touching on the reach of the antidiscrimination statutes have been solidly in favor of definitions which would be broad enough to include general partners.[16]

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15. The Seventh Circuit noted in *Burke v. Friedman* that the EEOC had dismissed the plaintiff's Title VII complaint against the law firm partnership *for want of subject matter jurisdiction*. No factual inquiry, as urged here, was indicated. *Burke*, 556 F.2d at 868.

16. *See* for example: Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 5, 947 (1982); Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 Wm. & Mary L. Rev. 75 (1984); Newcomb, *Hishon v. King & Spaulding: Discrimination in Professional Partnerships*, 62 Den. U.L. Rev. 2, 485 (1985); Note, *Civil Rights: Law Partners as Employees for Title VII Purposes?*, 35 U. Fla. L. Rev. 201, (1983); Note, *Hishon v. King & Spaulding: Implications for the Private Partnership*, 14 Cap. U.L. Rev. 151 (1984); Note, *EEOC Subpoena Enforcement to Determine ADEA Coverage of Partnership Retirement Policy — EEOC v. Peat Marwick Mitchell & Co.*, 19 Creighton L. Rev. 967 (1986); Note, *Tenure and Partnership as Title VII Remedies*, 94 Harv. L. Rev. 2, 457 (1980); Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 Mich. L. Rev. 282 (1977); Note, *The Application of Title VII to Law Firm Partnership Decisions: Women Struggle to Join the Clubs*, 44 Ohio St. L.J. 841 (1983); Note, *The Age Discrimination in Employment Act and Mandatory Retirement of Law Firm Partners*, 53 S. Cal. L. Rev. 1679 (1980).

Peripherally relevant extensions of coverage by the courts have occurred, *Hishon* being the most visible. *See Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977); *EEOC v. Rinella & Rinella*, 401 F. Supp. 175 (N.D. Ill. 1975). *See also EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 928 (8th Cir. 1985), *aff'g*, 589 F. Supp. 534 (E.D. Mo. 1984), *cert. denied*, 106 S.Ct. 1263 (1986).

Furthermore, there are so many partnerships engaged in day to day commerce in this country in ever expanding numbers that the statistical chance of discrimination claims has increased as a result of growth alone.[17] Then too, the changing status of women and minorities figures significantly in the equation. While partnerships of professionals have been common throughout the history of this country, as recently as twenty years ago relatively few women and minorities were represented, which may account for the early absence of discrimination suits against partnerships. Over the past two decades ever increasing numbers of women and minorities have been admitted into professional schools, thence into the professions.[18] Additional years have been required for their advancement to partnership status. Finally, growing experience under and familiarity with these Acts is producing an increase in discrimination claims against partnerships.

These facts may provide a better or more complete explanation for the history of judicial and agency actions, omissions, or silence since 1964 concerning the merits of the issue

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17. The statistical abstract, for example, shows total United States partnerships in the service area as growing from 239,000 in 1979 to 306,000 in 1983. Bureau of Census, U.S. Dept of Commerce, Statistical Abstract of the U.S., 506 (107th ed. 1987) [hereinafter Statistical Abstract]. Lawyers practicing as partners grew from 92,442 in 1970 to 190,187 in 1980. Statistical Abstract at 167 (107th ed. 1987).

18. For example, according to the statistical abstract of the United States, women comprised only 17% of all accountants in 1960 but by 1985 they comprised 44% of all accountants. Statistical Abstracts at 361-63 (96th ed. 1975); Statistical Abstracts at 385 (107th ed. 1987). Furthermore, only 230 law degrees were conferred upon women in 1960, comprising 2.5% of the total, compared to 13,630 degrees in 1984, amounting to 36.8% of the total. Statistical Abstract at 148 (107th ed. 1987).

of partners as employees under the Antidiscrimination Acts. Therefore, absence of a long-standing and reliable EEOC position is no surprise. Nonetheless, a disposition on the merits is made more difficult by its absence.

C. ***Partnership Attributes and Proposed Tests for Determining Employee Status.***

Predictably both sides attempt to control the focus of our inquiry. Main Hurdman dwells largely on characteristics of partnerships, while Wheeler and the EEOC concentrate on traits associated with employment. With respect to employment, various tests and factors which have been judicially created and applied in other situations are proposed. The remedial nature of the Acts is stressed both in conjunction with tests for employee status, and as a justification of its own.

We address the parties' positions first by reviewing aspects of partnerships generally, then by reviewing the proposed employee tests, then by analyzing them together.

1. *Partnership Status Generally*

While there may be no federal partnership law, as Wheeler argues, partnerships are firmly embedded in our jurisprudence and commonly referred to in universally understood ways by Congress and the courts without the necessity of dissecting the partnership law of each state in order to derive meaning. By the time the FLSA was first enacted in 1938, the Uniform Partnership Act ("UPA") had been adopted by eighteen states.[19] When Title VII was enacted in 1964 and the ADEA in 1967, forty states had adopted the UPA as the governing body of partnership law. As of 1984, forty-eight states, several territories, and the District of Columbia had adopted the UPA. Only Georgia and Louisiana have not adopted the uniform act. 6 Unif. Laws Ann. 1 (Supp. 1984) (table). Despite some differences in partnership law between states, the general indicia of partners and partnership are very similar across state lines. The UPA sets forth, among others, the following

19. In the United States, work began on a UPA in 1902, but it was not completed until 1914. A brief but thorough account of the drafting of the UPA is found in 6 Unif. Laws Ann. at 5-8 (1969).

characteristics of a partner: (1) unlimited liability (§ 15); (2) the right to share in profits and participate in management subject to agreement between partners (§ 18(a), (e)); (3) the right and duty to act as an agent of the other partners (§ 9); and (4) shared ownership (§ 6). In *Freese v. United States*, 455 F.2d 1146, 1150-51 (10th Cir. 1972), *cert. denied*, 409 U.S. 879 (1972), we stated that the parties' intent was the touchstone for finding a partnership relationship.

Citing those indicia of partnership, Main Hurdman contends that a partner *by definition* is not an employee under traditional common law principles. Status as a co-owner precludes simultaneous status as an employee.

Multiple rebuttals are offered to that argument. Owners in other contexts can be employees. *See Goldberg v. Whitaker House Coop.*, 366 U.S. 28 (1961) (members/owners of a knitting cooperative considered employees); *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983) (corporate vice-president and shareholder considered employee); *EEOC v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068 (6th Cir. 1982), (officers-directors considered employees), *cert. denied*, 464 U.S. 819 (1983); *Hoy v. Progress Pattern Co.*, 217 F.2d 701 (6th Cir. 1954) (shareholder, vice-president, director and chairman of board considered employee). *Cf. Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982) (sale of corporate stock subject to Title VII where employment status is tied to stock ownership), *cert. denied*, 467 U.S. 1251 (1984); *Marshall v. R. & M. Erectors, Inc.*, 429 F. Supp. 771 (D. Del. 1977) (worker considered an employee and not a partner where there was no written partnership agreement or evidence of partner attributes). For many purposes evolving law now classifies partnerships as separate entities rather than an aggregate of partners; thus, partners can be classed as employees of the partnership entity.[20]

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20. *See generally* J. Crane and A. Bromberg, *Law of Partnership*, sections 68-70 (1968). In *Bellis v. United States*, 417 U.S. 85 (1974) the Supreme Court applied the entity theory of partnerships to support its holding that a member of a three-partner law firm could not claim his Fifth

(Footnote 20 continues on folowing page)

Furthermore, ownership in very large partnerships is de minimus on an individual basis (Wheeler as one of 500, for instance). Finally, big partnerships are like corporations: "Wall Street law firms and stock brokerage firms provide significant examples. These are often large, impersonal, highly structured enterprises of essentially perpetual duration." *Bellis v. United States*, 417 U.S. 85, 93-94 (1974).[21]

Considering the many exceptions in the law we must agree with Wheeler and the EEOC that categorical absolutes are difficult to sustain in this area. However, there is no discernable trend to erase the traditional line between partners and employees. For instance, state courts defining "employee" for purposes of workmen's compensation laws have usually refused to classify partners as employees absent express statutory authority. "With the exception of Oklahoma and Louisiana, every state that has dealt judicially with the status of 'working partners' or joint venturers has held that they cannot be employees." 1C A. Larson, *The Law of Workmen's Compensation* § 54.30 (1986) (footnotes omitted). In *Robertson v. Alexander Grant & Co.*, 798 F.2d 868 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1296 (1987), the Fifth Circuit found that the Employee Retirement Income Security Act ("ERISA") did not apply to partners.[22] For purposes of ERISA, the Secretary of Labor has issued the following regulation: "A partner in a partnership and his or her spouse shall not be deemed

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(Footnote 20 continued from previous page)
Amendment privilege against self incrimination in order to avoid compliance with a grand jury subpoena ordering production of the partnership's financial records. In *Armstrong v. Phinney*, 394 F.2d 661 (5th Cir. 1968), a partner who managed a ranch owned by the partnership was classified for tax purposes as an employee of the partnership entity.

21. *See generally* discussion in Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 Mich. L. Rev. 282, 286-92 (1977).

22. The ERISA definition of "employee" is identical to the FLSA definition.

to be employees with respect to the partnership." 29 C.F.R. § 2510.3-3(c)(2) (1986). In *Empey v. United States*, 406 F.2d 157 (10th Cir. 1969), this court found that a partner was not an employee for the purpose of certain tax statutes; therefore, it was necessary under the tax laws for professionals to incorporate in order to obtain retirement plan benefits available to corporate employees.[23]

2. *The Economic Realities Test For Determining Employee Status.*

Wheeler and the EEOC urge adoption of an "economic realities" test for discerning employees among partners, on a case-by-case basis.[24] Economic reality to them translates into a

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23. The EEOC points out that in *Clarkson Constr. Co. v. Occupational Safety & Health Rev. Comm.*, 531 F.2d 451, 457 (10th Cir. 1976), we stated generally that common law standards are not dispositive in defining an employee for OSHA purposes. More to the point, the Bureau of Labor statistics has indicated that partners are not considered employees under OSHA. 1 Empl. Safety & Health Guide (CCH) ¶ 3039.68 (1978) (citing question 37, Bureau of Labor Statistics Report 412.2 (1975)).

24. The "economic realities" test, urged upon us by the plaintiff, was originally developed by the Supreme Court in the 1940s to distinguish independent contractors from employees of an employer for purposes of broadly applying social legislation. The common law "right to control" tests such as those found in the definition of servant in section 220, *Restatement (Second) of Agency*, were rejected. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (determining whether newsboys were independent contractors or employees under the National Labor Relations Act ("NLRA")); *United States v. Silk*, 331 U.S. 704 (1947) (determining whether truck drivers and unloaders of coal were independent contractors or employees under the NLRA); *Bartels v. Birmingham*, 332 U.S. 126 (1947) (determining whether dance bands were independent contractors or employees of dance halls under the Social Security Act ("SSA")). Although many of the early cases involved interpretations under the NLRA and the SSA, the Supreme Court held that these decisions were persuasive in defining the coverage under the FLSA. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1947). *See also Hyland v. New Haven*

(Footnote 24 continued on following page)

condition of domination: Is the individual so dominated in or by the organization that he or she is really like an employee, with corollary susceptibility to discrimination?[25]

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Radiology Assocs., 794 F.2d 793, 796 (2nd Cir. 1986) ("cases construing the definitional provisions of [the FLSA, Title VII or the ADEA] are persuasive authorities when interpreting the others"); *Armbruster v. Quinn*, 711 F.2d 1332, 1336 (6th Cir. 1983) (NLRA provides guidance for Title VII). Subsequent to *Hearst*, *Silk*, and *Bartels*, Congress amended the NLRB and SSA to restore common law definitions to employee/independent contractor distinctions, but made no similar amendment to the FLSA. Writers urging a holistic approach to the legislative history of Title VII and the ADEA point out that by omitting the type of exclusions found in the NLRA and SSA Congress intended the broad definitions under and application of the FLSA to apply. *See, e.g.*, Dowd, *The Test of Employee Status: Economic Realities in Title VII*, 26 Wm. & Mary L. Rev. 75, 89-96 (1984).

25. The relationship is described as one of inequality of bargaining power and economic dependence. Dowd, *supra* note 24, at 85-86.

> Control of employment opportunities is the linchpin of the economic realities test, viewed from the perspective of the employee's dependency on the employer and vulnerability to discriminatory conduct.
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> [T]he focus of the analysis must be on whether the employer controls employment opportunities because of its position in the employment marketplace or because of its ability to determine the terms and conditions of employment. This requires an economic analysis of institutional and societal patterns of discrimination that affect the employment marketplace . . .

Id. at 112-13 (footnote omitted).

Wheeler's brief also emphasizes that employee is defined in terms of the remedial purposes of the statute. Brief of Plaintiff/Appellee at 9-10. "The goal is to rid from the world of work the evil of discrimination." *Id.* at 10 (quoting in part from *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983)). Wheeler states: "It is the nature of the work performed, and the independence or lack of independence that makes an individual an employee for purposes of the statutes." Brief of Plaintiff/Appellee at 20. The EEOC echoes the independence versus domination theme, stating that status as an employee "depends in large part on that individual's ability *actually to control* factors such as the management of the firm and critical elements of his or her work." Brief of EEOC at 25 (emphasis added).

Wheeler and the EEOC are not united, however, on what factors best express the domination principle. The district court based its decision on three: power to hire and fire; supervision of work schedules and conditions of employment; and control of compensation. *Wheeler v. Main Hurdman*, No. 85-C-163, slip op. at 2-3 (D. Colo. Aug. 13, 1985). Although the EEOC included these same factors as well as others in its argument, it ignores any defense of or express reliance on the district court's ruling; Wheeler refers to it more as an afterthought at the conclusion of her main arguments respecting the economic reality test.

The EEOC, "for purposes of this brief" assumes the existence of a hybrid economic reality/common law control test, asserting that most courts have been using that "restrictive" approach. Brief of EEOC at 15, 16, 18 n.14. It cites at length from *Spirides v. Reinhardt*, 613 F.2d 826, 831-32 (D.C. Cir. 1979), indicating approval of the hybrid standard set forth in that case, which included the right to control the means and manner of the worker's performance, plus eleven additional factors. In *Spirides*, the court stated:

> *[D]etermination of whether an individual is an employee or an independent contractor for purposes of the Act involves, as appellant suggests, analysis of the "economic realities" of the work relationship.* This test calls for application of general principles of the law of

agency to undisputed or established facts. Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor to review here, as it is at common law and in the context of several other federal statutes. If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist.

Additional matters of fact that an agency or reviewing court must consider include, among others, (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; *i.e.*, by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Id. at 831-32 (footnotes omitted) (emphasis added). The EEOC, in a 1985 decision, classified as relevant factors "the individual's ability to control and operate the business and to determine compensation and the administration of profits and losses." EEOC Decision No. 85-4, 2 Empl. Prac. Guide (CCH) ¶ 6846, 7041 n.4 (1985).

Wheeler places no such reliance on *Spirides*. Her brief quotes at length from *Goldberg v. Whitaker House Coop.*, 366 U.S. 28 (1961).[26] *Goldberg*, in turn, is not similarly relied upon by the EEOC.

26. In *Goldberg* the Supreme Court found that for purposes of the FLSA certain homeworkers were employees as well as members of a cooperative, which they had each paid three dollars to join. The Court first outlined the long regulatory history dealing specifically with prohibitions against homework, and stated:

> We think we would be remiss, in light of this history, if we construed the Act loosely so as to permit this homework to be done in ways not permissible under the Regulations. By § 3(d) of the Act an "employer" is any person acting "in the interest of an employer in relation to an employee." By § 3(g) the term employ "includes to suffer or permit to work." We conclude that the members of this cooperative are employees within the meaning of the Act.
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> It is the cooperative that is affording them "the opportunity to work, and paying them to do it," to use the words of Judge Aldrich, dissenting below. 275 F.2d, at 366. However immediate or remote their right to "excess receipts" may be, they work in the same way as they would if they had an individual proprietor as their employer. The members are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates. Apart from formal differences, they are engaged in the same work they would be doing whatever the outlet for their products. The management fixes the piece rates at which they work; the management can expel them for substandard work or for failure to obey the regulations. The management, in other words, can hire or fire the homeworkers. Apart from the other considerations we mentioned, these powers make the device of the cooperative too transparent to survive the statutory definition of "employ" and the Regulations governing homework. In short, if the "economic reality" rather than "technical concepts" is to be the test of employment *(United States v. Silk*, 331 U.S. 704, 713; *Rutherford Food Corp, v. McComb*, 331 U.S. 722, 729), these homeworkers are employees.

366 U.S. at 31-33 (1961) (footnotes omitted).

The EEOC points out that the liberal definitions given to the term "employee" under early Supreme Court cases applying the FLSA, *see supra* note 24, still apply, and therefore argues that our opinion in *Doty v. Elias*, 733 F.2d 720 (10th Cir. 1984), is relevant.[27] In *Doty* we held that certain waiters and waitresses were employees, rather than independent contractors as claimed by the owner of the restaurant where they worked. We said:

> In determining whether an individual is an "employee" within the meaning of the FLSA, we must look to the economic realities of the relationship. *Castillo v. Givens*, 704 F.2d 181, 188 (5th Cir.), *cert. denied*, ____ U.S. ___, 104 S.Ct. 160, 78 L.Ed.2d 147 (1983). The focal point in deciding whether an individual is an employee is whether the individual is economically dependent on the business to which he renders service, *see Bartels v. Birmingham*, 332 U.S. 126, 130, 67 S.Ct. 1547, 1549, 91 L.Ed. 1947 (1947), or is, as a matter of economic fact, in business for himself. *Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. 1981). In applying this test, the courts generally focus on five factors: (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; and (5) the degree of skill

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27. The EEOC states:

> With respect to the Equal Pay Act, the FLSA test, endorsed by this Court in *Doty v. Elias*, is applicable. However, for convenience we will use the hybrid test to analyze Ms. Wheeler's status under all three statutes inasmuch as the tests are not significantly different when applied to the facts of this case. A primary difference between the FLSA test and the hybrid approach taken under Title VII and the ADEA is that the FLSA test accords much less weight to an employer's lack of control over work performance. However, as discussed *infra*, in this case Mrs. Wheeler's superiors at Main Hurdman controlled the significant aspects of her work.

Brief of EEOC at 18 n.14.

required to perform the work. *Trustees of Sabine Area Carpenters' Health & Welfare Fund v. Don Lightfoot Home Builder, Inc.*, 704 F.2d 822, 825 (5th Cir.1983).

Id. at 722-23.

The foregoing survey of tests and factors offered by the proponents has been set forth in detail partly for purposes of our analysis, and partly to show the absence, rather than the presence, of any coherent standard of "economic reality" for supposed application to partners.

3. *Application of the Proposed Economic Realities Test and Factors to Partnerships.*

This court is committed to use of an economic realities test in applying remedial social legislation but only where and to the extent appropriate. *See Doty v. Elias*, 733 F.2d 720 (10th Cir.1984).[28] We disagree with Main Hurdman's position that an economic realities test is categorically inapplicable to partnerships, but we also reject the form proposed by Wheeler and the EEOC as incomplete when applied to partnerships for several reasons.

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28. Even from the EEOC standpoint the economic realities test is not an overarching principle. The EEOC surely would not entertain the notion, for instance, that a corporate employee was *not* covered under the Acts even if a compelling set of facts revealed that the employee completely dominated the work environment and compensation within the corporation. Within the past year the Second Circuit rejected entreaties of a physicians' group to apply an economic realities test to their professional corporation, and reversed the district court which did. It held that the plaintiff/doctor, who in most accepted senses was only technically an "employee" of the corporation, was an employee under the ADEA, stating that "use of the corporate form precludes any examination designed to determine whether the entity is in fact a partnership." *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793 (2nd Cir. 1986). Addressing the type of factors urged here, the court said:

> NHRA urges us to "develop a . . . list of factors to be considered in determining if an individual is a 'partner' or a covered 'employee.'" There is no need to develop such a list of factors where the individual involved is a corporate employee, for we hold that every such employee is "covered" for purposes of the ADEA and that any inquiry respecting partnership status would be irrelevant.

Id. at 798 (ellipses original).

The first difficulty with the many economic reality factors proferred to us is that they largely arise from cases involving alleged independent contractors.[29] The line-drawing exercise in those cases was between those who were really part of a business (employees) and those who were running a separate business (independent contractors). Factors employed for that purpose are useless for drawing lines between people who are part of the same enterprise. For example, in *Doty* we stated that: "The focal point in deciding whether an individual is an employee is whether the individual is economically dependent on the business to which he renders service . . . or is, as a matter of economic fact, in business for himself." 733 F.2d at 722-23. Such an inquiry fails as a means of distinguishing among partners. Every general partner, at least in professional partnerships, is "dependent on the business," and does not pretend to be "in business for himself." *Id.* Yet, such an inquiry is the central theme of virtually every "economic realities"

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29. The EEOC cites the following cases in support of its "hybrid" test which it urges us to adopt: *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979) (further factual inquiry required to determine whether foreign language radio broadcaster was an employee or an independent contractor); *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979 (4th Cir. 1983) (salesman was independent contractor, not employee, under ADEA); *EEOC v. Zippo Manufacturing Co.*, 713 F.2d 32 (3rd Cir. 1983) (salesmen were independent contractors, not employees under ADEA); *Cobb v. Sun Papers, Inc.*, 673 F.2d 337 (11th Cir.) (janitor/custodian was independent contractor, not employee, under Title VII), *cert. denied*, 459 U.S. 874 (1982); *Unger v. Consolidated Foods Corp.*, 657 F.2d 90[illegible] (7th Cir. 1981) (salesman was employee, not independent contractor under Title VII), *vacated on other grounds*, 456 U.S. 1002 (1982); *Lutcher v. Musicians Local 47*, 633 F.2d 880 (9th Cir. 1980) (musicians were independent contractors, not employees, under Title VII).

Similarly with respect to cases cited by the EEOC as supporting a pure economic realities test under Title VII: *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983) (manufacturer's representative was employee, not independent contractor, under Title VII); and under FLSA: *Goldberg v. Whitaker House Coop.*, 366 U.S. 28 (1961) (fact situation involved purported members of cooperative as employees, but decision covered underlying independent contractor controversy); *Doty v. Elias*, 733 F.2d 720 (10th Cir. 1984) (waiters and waitresses were employees, not

(Footnote 29 continued on following page)

case cited. Similarly unhelpful factors include: whether the employer "furnishes the equipment used and the place of work," "length of time during which the individual has worked," and, payment by time or "by the job," *Spirides*, 613 F.2d at 832. It is also irrelevant in a partnership context to inquire whether the occupation requires skill, *id.* Any professional partner would be considered skilled under any circumstance. Inquiries into annual leave and retirement benefits, *id.*, are also inapplicable since such matters could include all general partners. In short, the specific independent contractor/employee factors cited to us are largely useless in a general partnership context.

(Footnote 29 continued from previous page)

independent contractors, under Title VII); *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376 (3rd Cir.) (home researchers for a telephone soliciting organization found to be employees, not independent contractors), *cert. denied*, 106 S. Ct. 246 (1985); *Carter v. Dutchess Community College*, 735 F.2d 8 (2nd Cir. 1984) (prison inmates working as teaching assistants in college courses offered at prison may qualify as employees); *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983) (domestic "chore workers" were employees of state and county governments); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977) (voluntarily separated former employee considered an employee under FLSA); *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308 (5th Cir.) (operators of laundry pick-up stations were employees not independent contractors), *cert denied*, 429 U.S. 826 (1976); *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297 (5th Cir. 1975) (hotel cardroom operator was an employee not an independent contractor). Wheeler's cases involving reliance on early Supreme Court cases are to the same effect. *See NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (newsboys were employees not independent contractors under the NLRA); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (slaughterhouse workers were employees under the FLSA); *United States v. Silk*, 331 U.S. 704 (1947) (truck drivers and unloaders of coal were employees not independent contractors).

The second difficulty with the profferred tests is that they purport to, but in fact do not, encompass reasonable limits. We are assured that these tests would not result in every partner falling under the Acts.[30] Brief of Plaintiff/Appellee at 14. Size is suggested to be an underlying criterion, presumably because according to Wheeler, "[b]eing a 'partner' in a four partner firm is significantly different than being a 'partner' in a 500+ partner firm. The economic realities are markedly different." *Id.*[31] That is not necessarily so. The heart of the standard proposed to us is a theory that any individual who is organizationally or economically dominated is an employee. In applying the domination theory to partnerships, there is an underlying assumption by its proponents that a "true" general partnership operates like a New England town meeting; that "true" general partners are not employees because they personally control management of the business and their own affairs within the business; that "true" general partners are not "dominated;" they are not controlled; they enjoy equality of bargaining power. Presumably, a "true" partner is not only heard at partnership meetings but actually controls the result as it affects that partner.

With due respect, those arguments and assumptions are not likely to translate to the real world with any discernible limits. Partnerships, as Justice Powell so aptly stated in his concurring opinion in *Hishon*, embody very special relationships and sensitive management concerns *inter se;* however, de facto "domination" or "control" of work, clients, billings, and compensation by key partners may be more common than not, and size of the partnership is not necessarily the determinative factor. Indeed, large

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30.Wheeler and the EEOC attempt to distinguish *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977), and *EEOC v. Dowd*, 736 F.2d 1177 (7th Cir. 1984), for instance, on the ground that there were just a few partners in each partnership and that, therefore, all were active participants in managing their own affairs. There is not the slightest evidence in those cases that such participation was the fact.

31. One writer classifies "very large firms" as "those with twenty or more partners." Note, *The Age Discrimination in Employment Act and Mandatory Retirement of Law Firm Partners*, 53 S. Cal. L. Rev. 1679, 1704 (1980).

partnerships may operate more democratically overall than small partnerships, which are frequently vulnerable to domination by a single partner or a small group of partners. "Domination" of a partner in assignment and supervision of work, billing, share of profits, and other matters can result from a myriad of wholly practical reasons existing from time to time in any partnership. Furthermore, a certain amount of "domination" may flow from the necessity of an organizational structure even in the smallest partnership. When the EEOC asserts that status depends upon the "individual's ability *actually to control* factors such as the management of the firm and critical elements of his or her work," Brief of the EEOC at 25 (emphasis added), we must wonder just how many partners the "actual control" requirement describes in the real world, and if *any* partnership of any duration would not have employee partners. What the EEOC and Wheeler are describing as true partners are sole proprietors and a limited number of dominant partners nationwide.

Thus, as stated, there is no way of applying the "domination" standard of reality urged upon us without including virtually every partnership in the United States,[32] with the burden shifting to the

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32. The fifteen and twenty covered person minimum, respectively, under Title VII and the ADEA, would implicate even a two-person partnership with fourteen, or nineteen, staff personnel. Furthermore, as pointed out by one commentator:

> The issue of whether partners are counted as employees under Title VII is important in light of the fact that many state civil rights statutes often have lower jurisdictional requirements than Title VII. Most state civil rights statutes encompass the protections of Title VII, and many also prohibit discrimination on the basis of age and handicap.

The footnote supporting that text states:

> Of the states constituting the Tenth Circuit, Colorado, Kansas, New Mexico, and Wyoming have statutes prohibiting discrimination by employers with fewer than fifteen employees. *See* Colo. Rev. Stat. § 24-34-401 (3) (two or more employees); Kan. Stat. Ann. § 44-1002(b) (four or more employees); N.M. Stat. Ann. § 28-1-2(B) (four or more employees); Wyo. Stat. § 27-9-102 (two or more employees).

(Footnote 32 continued on following page)

partnerships to prove some sort of parity of influence and day-to-day independence between and among the partners, free of "control" by the partnership as a whole. Perhaps, proponents would see this as unobjectionable, and a wholly appropriate interpretation and application of the Acts, but such wholesale application is not the way this case was argued.

Indeed, inequality of bargaining power, the dominant ability to perpetuate or terminate a business relationship and otherwise to dictate terms, probably characterizes most dealings between large corporations and independent contractors. Yet, no one has yet suggested that de facto economic domination alone is enough to constitute the standard for defining all such independent contractors as employees — even though actual discrimination may occur.

The "realities" factors present yet another set of problems when applied to partners. Partner status is supported by agreement—written, oral, or implied—and statutes. Thus, "domination" of a partner may consist not of an absence of rights, as with an independent contractor, but of an abdication of rights, which may or may not be a temporary submissiveness. Accusations of de facto "control" of an individual will be met, as here, with recitations of legal rights. Breach of contract may have to be established before true "control" can be established.

Further, the status of partner is permanent while the envisioned "employee" status is a transient overlay. In the independent contractor cases the essential question was whether or not an individual was part of an enterprise (an employee) or running a separate enterprise. There is no such dividing line here. A potentially chaotic situation is presented with partners drifting into and out of covered "employee" status, remaining partners all the while, with no one ever quite knowing who is an employee/partner and who is a "pure" partner. The situation is

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(Footnote 32 continued from previous page)

Newcomb, *Hishon v. King & Spaulding: Discrimination in Professional Partnerships*, 62 Den. U.L. Rev. 2, 485, 492 (1985) (other footnote omitted).

rendered even more confusing when, as here, the complaint runs more to a regional office of the partnership than to the partnership and its governing agreement. Thus, because of an autocratic partner in charge of an office, the partners may be employees until the local partner is changed; but in other offices of the partnership, the partners with a less autocratic administrative partner are not employees. The EEOC and Wheeler depart entirely from any consideration of a legal or contractual right to control or share in control and look at drifting expressions of autocracy or democracy from place to place and person to person.

The central problem with the approach by Wheeler and the EEOC, however, is that it either ignores or relegates to insignificance the economic reality of partnership status itself. We view that as a fatal flaw. Status as a general partner carries important economic reality as well. Employees do not assume the risks of loss and liabilities of their employers; partners do. It is no small thing to be exposed to unlimited liability, to be personally at risk for a partner's mistakes, and to have one's share of profits always potentially conditional upon the outcome of claims, suits, and obligations generated by another partner. Partnership size, such as Main Hurdman's, guarantees no safety from liability. Nor does insurance. Numerous partners multiply risk. Firm size also makes a tempting litigation target. Large firms deal with large clients and with transactions and engagements involving enormous sums of money. Risk and potential liability are proportional. It is not unusual to see prayers of complaints in the hundreds of millions of dollars, especially in cases of spectacular business failures. Settlements of suits over one matter can run into the tens of millions of dollars. Even if the partnership is viewed as an entity separate from the partners for some purposes, it cannot shield the partners from risk, including liabilities arising from suits by other partners. There is simply no equivalent to unlimited liability in *any* case dealing with the definition of employee, nor is there any equivalent in any understood definition of the term.

Other common characteristics of partnerships are profit sharing; contributions to capital; part ownership of partnership assets, including a share of assets in dissolution of the enterprise; and the right to share in management subject to agreement among

the partners.[33] These are economic realities, and no definition of "employee" is co-extensive. Additionally, as previously indicated, an entirely different body of statutes and case law applies to partners and partnerships, conferring rights and imposing obligations wholly foreign to, for instance, a corporate employee. When individuals combine to carry on business as partners all these factors introduce complexities and economic realities which are not consonant with employee status.

This conclusion is not inconsistent with the various cases cited by Wheeler and the EEOC, including the Supreme Court decision in *Goldberg v. Whittaker*, relied upon by the district court. The homeworkers in *Goldberg*, for example, bore no risk of liability or risk of loss of the business, or real opportunity to share in the profits of the business;[34] nor did the foreign language broadcaster in *Spirides*, the janitor in *Cobb*, or the plaintiffs in any of the other cited cases. *See supra* note 29. Nor did any of those plaintiffs enjoy the substantive economic and legal rights enjoyed by partners with respect to their businesses, including rights possessed by Wheeler in this case. Of the five factors listed by us

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33. UPA §§ 6, 9, 15 and 18 (a), (e).

34. There are many additional distinctions between *Goldberg* and this case. *Goldberg* dealt with a cooperative. Cooperatives are typically viewed as a form of corporate organization; their existence is dependent upon state cooperative incorporation laws or general incorporation laws. *See* I. Packel, *The Organization and Operation of Cooperatives* § 9 (4th ed. 1970). They are typically referred to as "cooperative corporations." *See* 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 68 (rev. perm. ed. 1983) [hereinafter "Fletcher"]; 1A Fletcher § 109 (rev. perm. ed. 1983); 16A Fletcher §§ 3285, 3286 (rev. perm. ed. 1979). Further "[a] cooperative incorporated under a cooperative statute is still a corporation and, as such, is affected by statutes that are applicable to corporations in general." I. Packel, *The Organization and Operation of Cooperatives* § 6(b)(3) at 36 (footnotes omitted). A number of years before *Goldberg* came before the courts, the Administrator of the Wage and Hour Division of the U.S. Department of Labor stated that a cooperative is more like a corporation than a partnership and that generally members of a cooperative are employees of the cooperative for purposes of the FLSA. 1941 Wage & Hour Manual at 58 (quoted in *Mitchell v. Whitaker House Coop.*, 275 F.2d 362, 365 n.1 (1st Cir. 1960), *rev'd sub nom, Goldberg v. Whitaker House Coop.*, 366 U.S. 28 (1961)).

in *Doty*, two (opportunity for profit and loss, and investment in the business) are regarded as inconsistent with employee status, and are fundamental to partnerships.

All of the foregoing reasons are answers to the declaration by the EEOC that "there is no rational basis for treating a partner differently than any other working individual." Brief of the EEOC at 22. There, of course, is a rational basis, as explained above.

In summary, while we do not reject invocation of any economic realities test in this case, we reject as incomplete the version used by Wheeler and the EEOC. That version itself fails to reflect economic reality.

4. *Limitations on Remedial Goals of the Legislation.*

As we stated at the outset, this is a case of statutory interpretation. There are statutory limitations to the argument that the remedial ends of the Acts justify as means any definition of employee which results in coverage. The underlying theme of the Wheeler/EEOC arguments is that discrimination itself defines the application of the Acts. Thus, all partnerships must be under the Acts. A "pure" partner is one who has enough power to avoid or defeat any act of discrimination. Any partner who can be discriminated against is, ipso facto, an employee. The problem with that reasoning is that it must include independent contractors and every other business relationship as well. If Congress had intended the Acts to apply to the performance of all services, subject to stated exceptions, it would have said so. To suggest that Congress intended the provisions of Title VII, the ADEA, and the FLSA to reach all situations where discrimination may arise in a business setting is to suggest that it enacted these statutes with the intent that they cover all individuals having an economic relationship with a business. This would make employee status largely irrelevant and would essentially transform the employment discrimination statutes into *business* discrimination statutes. *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983). If this were the case, then we must question why Congress bothered to limit each statute's reach to employment practices. The requirement that the statutes cover only employment situations suggests that Congress perceived a need to limit the application of these statutes.

Id.; see also Hishon v. King & Spaulding, 467 U.S. 69, 79 (1984) (Powell, J., concurring).[35]

The word "employee," however broadly defined, is still "employee," and circumscribed by meanings reasonably related to that word. Drafters of the statute gave no indication that they were departing from the common discourse of the republic when fashioning a law to be understood by and applied to its citizens. In shaping the economic realities test, the Supreme Court made just that point in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944):

> Congress, on the one hand, was not thinking solely of the immediate technical relation of employer and employee. It had in mind at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the labor dispute. It cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes. Congress had in mind a wider field than the narrow technical legal relation of "master and servant," as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering services to others.

Id. at 124 (footnote omitted).

Such reasoning and authority answer the argument that Congress did not specifically exempt partners in the Acts, but did so with other groups[36] and, therefore, partners must be covered.

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35. Other statutes, apart from those involved in this case, may provide a remedy for discrimination in the business setting. For example, this court recently held that a black employee's claim of employment discrimination under 42 U.S.C. § 1981 was not preempted by Title VII. *See Meade v. Merchants Fast Motorline, Inc.*, ___ F.2d ___, No. 85-1061 (10th Cir. June 18, 1987). Claims under § 1981 or other statutes may not have the same statutory limitations that constrain us here.

36. Title VII and the ADEA contain certain exemptions for elected government officials and policymakers. *See* 42 U.S.C. § 2000(e)(f); 29 U.S.C. § 630(f); *see also* 29 U.S.C. § 631(c).

Use of "employee" instead of a broader designation provides its own exclusion of bona fide general partners.

D. ***Summary***

There may be many aspects of a partner's work environment in a partnership which are indistinguishable from that of a corporate employee. But in general the total bundle of partnership characteristics sufficiently differentiates between the two to remove general partners from the statutory term "employee." The case before us, which we regard as a "best case" presentation of the EEOC/Wheeler arguments, illustrates the point. Wheeler's circumstances as a partner are portrayed as indistinguishable from her prior employee status. Yet they are distinguishable, and substantially so. Her participation in profits and losses, exposure to liability, investment in the firm, partial ownership of firm assets, and her voting rights—plus her position under the partnership agreement and partnership laws—clearly placed her in a different economic and legal category. Evidence of that conclusion is found in the fact that only a small percentage of Main Hurdman personnel were admitted to the partnership. Similarly the characteristics of general partnership are different from that of a small, voting shareholder/director or officer of a large corporation.

For these reasons we reject both the "control" test and the economic realities test framed by Wheeler and the EEOC, for use in bona fide general partner situations. Such tests ignore or unacceptably diminish the essential attributes of partnership, as well as being incapable of rational application. We also reject the essential thrust of the Wheeler/EEOC position that susceptibility to discrimination defines coverage under the Acts. There is no statutory support for such a broad test.

Our review of the statutes, the legislative history, agency position, the applicable cases, and the proferred tests leads inevitably to the conclusion that bona fide general partners are not employees under the Antidiscrimination Acts. If Congress amends the Acts to include partners it will be in a position through the hearing and debate process to fashion restrictions appropriate to partnerships. More importantly, by categorical inclusion or exclusion of partners Congress will allow administration of the

Acts without resort to a case-by-case approach based on illogical, unsatisfactory types of tests such as those proposed here.

Pending examination of the question by Congress, partnerships do not remain free of the remedial effects of the Acts. The Supreme Court decision in *Hishon* requires a non-discriminatory open door to partnership consideration. Furthermore, partnerships obviously cannot without impunity admit one to the partnership merely as a device for avoiding application of the Acts, for then the bona fides of partnership status would be in question.[37]

III.
WHEELER'S CLAIM OF EMPLOYEE STATUS

There may be circumstances not fairly covered by our holding excluding bona fide general partners from coverage under the Acts. The bundle of partnership characteristics we have identified may be lacking in important particulars, or there may be some deception which compromises the actuality of those characteristics.[38] As

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37. It is argued that the Acts would have no meaning if they cover consideration for partnership but can be ignored after partnership. In *Hishon* the Supreme Court said: "It is also of no consequence that employment as an associate necessarily ends when an associate becomes a partner." 467 U.S. at 69. *See also Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 188 (1973):

> It is undisputed that when [the employee] was discriminatorily discharged he was an ordinary employee. The Act's remedies are not thwarted by the fact that an employee who is within the Act's protections when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated against.

38. For example, when the FLSA was originally enacted in 1938, some employers reorganized all of their employees into cooperatives or partnerships in an attempt to avoid compliance with FLSA provisions. *See, e.g., Mitchell v. Whitaker House Coop.*, 170 F. Supp. 743 (D. Maine 1959), *aff'd*, 275 F.2d 362 (1st Cir. 1960), *rev'd sub nom, Goldberg v. Whitaker House Coop.*, 366 U.S. 28 (1961) (cooperative); *Walling v. Plymouth Mfg. Co.*, 46 F. Supp. 483 (N.D. Ind. 1942), *aff'd*, 139 F.2d 178 (7th Cir. 1943) (partnership); *Fleming v. Palmer*, 123 F.2d 749 (1st Cir. 1941) (cooperative).

Justice Powell noted: "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'" *Hishon*, 467 U.S. at 79 n.2. Those and similar circumstances expose the basic status of "bona fide general partner" to question and examination.

Wheeler pleads no such facts, and our examination of the complaint and Wheeler's affidavit reveals nothing which would avoid our holding as to partners generally. We conclude, therefore, that the district court erred in its decision that Wheeler was an employee of Main Hurdman at the time of the acts and events of which she complains.

CONCLUSION

We have considered all of the arguments raised by Wheeler and the EEOC, and consider them insufficient to sustain the ruling by the district court. For the reasons stated above, we hold that bona fide general partners are not employees under the Antidiscrimination Acts. We also hold that Wheeler, as an acknowledged general partner of Main Hurdman, was not covered by the Acts and that the district court erred in its ruling that she was. The decision of the district court is REVERSED and the case REMANDED to the district court with instructions to enter judgment in favor of Main Hurdman, dismissing the complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 85-0-163

MARILYN WHEELER,

Plaintiff,

v.

MAIN HURDMAN,

Defendant.

ORDER

CARRIGAN, J.

Plaintiff, Marilyn Wheeler, brought this action for damages against the defendant, Main Hurdman, (the "firm"), an accounting firm which has over 3500 total employees and over 500 partners. She has asserted claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-s *et seq.*, the Equal Pay Act, 29 U.S.C. § 200, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 623 *et seq.* , and under a state common law theory of breach of contract. Defendant has moved to dismiss all of the claims pursuant to Fed. R. Civ. P. 12. Because both parties have submitted affidavits in support of their positions, I will treat the defendant's motion as one for summary judgment under Fed. R. Civ. P. 56.

It is undisputed that the plaintiff accepted employment with the predecessor partnership of the defendant in 1973. She worked as an accountant with the defendant through April 1, 1982, when she was elected to partnership in the firm. This election entailed certain changes in her relationship with the firm. For example, she entered into the firm's partnership agreement; her compensation changed from a salary to a guaranteed draw and share of the firm's profits; she was given a vote in certain management decisions; and

she became liable for the firms debts and obligations. (Affidavit of Richard L. West). Other aspects of the plaintiff's relationship with the defendant, however, did not change. Her client load and support staff continued as before; her work duties and responsibilities were essentially unaltered; and her compensation continued to be determined by persons more senior than herself. (Affidavit of Marilyn Wheeler).

In determining whether the plaintiff is an "employee" under Title VII, the Equal Pay Act, and the ADEA, I must look to the economic realities of the employment relationship. *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961). I find and conclude that the plaintiff is an "employee" under these statutes. First, the defendant had the power to fire the plaintiff. (Affidavit of Richard L. West). Second, the defendant supervised the plaintiff's work schedules and conditions of employment. Finally, the defendant determined the plaintiff's rate of compensation. *See Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983).

The defendant's Motion to Dismiss is denied.

Dated at Denver, Colorado, August 13, 1985.

BY THE COURT:

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JIM R. CARRIGAN, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 85-C-163

MARILYN WHEELER,

Plaintiff,

v.

MAIN HURDMAN,

Defendant.

ORDER

CARRIGAN, J.

By Order of August 13, 1985, I held that the plaintiff was an employee of the defendant for purposes of Title VII. That order is hereby amended to state that the issue involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal of the order may materially advance the ultimate termination of this litigation. *See* 28 U.S.C. § 1292(b) (1982). Proceedings in this action are stayed pending review of my order by the Tenth Circuit Court of Appeals. Defendant's motion for extension of time to answer is granted. Defendant shall file an answer within ten days following either the date on which the Tenth Circuit denies review of the order or the date on which the Tenth Circuit affirms the order denying the motion to dismiss.

Dated at Denver, Colorado, September 17, 1985.

BY THE COURT:

JIM R. CARRIGAN, JUDGE
UNITED STATES DISTRICT COURT

Appendix 2A

DISTRICT COURT, DISTRICT OF COLORADO

COMPLAINT

MARILYN WHEELER, Plaintiff,

v.

MAIN HURDMAN, Certified Public Accountants,

a Partnership, Defendants.

COMPLAINT

The Plaintiff, Marilyn Wheeler, for damages and redress of unlawful acts of sex discrimination by Defendant in violation of Title VII of the Civil Rights Act of 1964 (42 USC Sections 2000(e) et seq), of age discrimination by the Defendant in violation of the Age Discrimination in Employment Act of 1967 (29 USC 621 et seq), and for other relief respectfully alleges:

1. Plaintiff, Marilyn Wheeler, is a female citizen of the United States in the State of Colorado and is licensed and actively engaged in the practice of Certified Public Accounting in Denver, Colorado.

2. Defendant, Main Hurdman, is a general partnership engaged in the practice of Certified Public Accounting in Interstate Commerce in the United States with over 70 offices including offices in Denver, Colorado, New York, New York, Washington D.C. and elsewhere.

Main Hurdman employs over 3,500 total personnel including in excess of 500 partners and is an employer within the meaning of 42 USC Section 2000(e) and 29 USC Section 630(b).

3. Jurisdiction of Plaintiff's first claim for relief is conferred by Title VII of the Civil Rights Act of 1964, 42 USC Section 2000(e)-5(f)(3) and by 28 USC Section 1331; jurisdiction of Plaintiff's second claim for relief is conferred by the Equal Pay Act 29 USC Section 216(b) and by 28 USC Section 1337; jurisdiction of Plaintiff's third claim of relief is conferred by 29 USC Section 623(a) and by 28 USC Section 1337; jurisdiction of Plaintiff's fourth claim for relief is pendant.

Appendix 3

FIRST CLAIM FOR RELIEF

4. Plaintiff is a graduate of the University of Colorado with a major in accounting and a Bachelor of Science Degree conferred summa cum laude in 1972. Plaintiff obtained a Masters of Taxation from the University of Denver, Schools of Law and Accounting in 1980. Throughout Plaintiff's educational career, Plaintiff was recognized for her excellent skills and academic achievement.

5. Plaintiff was certified and licensed to practice as a Certified Public Accountant in the State of Colorado in 1973 and since that time has been an active member of the Certified Public Accounting profession in good standing in Denver, Colorado. Plaintiff is a member of the American Institute of Certified Public Accountants; the Colorado Society of Certified Public Accountants where she served as a member of the Federal Taxation Committee and as Chairman of the Liason sub-committee of the State Taxation Committee; of the Petroleum Accountants Society; of the American Society of Women Accountants (where she served as a past President of the Denver Chapter and as a representative on the Internal Revenue Service liason committee); of the American Women's Society of Certified Public Accountants (where she has served as a member of the National Board of Directors).

6. Upon graduation from the University of Colorado in 1972 and Certification in 1973, Plaintiff interviewed with a number of Certified Public Accounting firms practicing in the Denver area and received a number of offers from outstanding Certified Public Accounting firms in the Denver, Colorado Metropolitan area.

7. In 1973, Plaintiff interviewed with Hurdman & Cranstoun, a predecessor partnership, which subsequently merged into the partnership presently known as Main Hurdman. At the time of her initial interview and recruitment by Hurdman & Cranstoun, in continuing after her employment by Hurdman & Cranstoun and later by Main Hurdman, Main Hurdman or its predecessor Hurdman & Cranstoun represented to Plaintiff and to other CPA's whom the partnership was seeking to employ that:

a) the partnership employs Certified Public Accountants of high academic standing and professional promise.

b) That newly employed CPA's were employed with the expectation that they would be promoted and would become partner in the partnership on a fair and equal basis and within reasonable period of time.

c) That the partnership would make annual evaluations of an employee Certified Public Accountant's progress toward partnership and would truthfully advise the employee Certified Public Accountant of the results of those evaluations.

d) That employee CPA's who received satisfactory annual evaluations would be promoted and employed as partners by the firm as a matter of course.

e) That the partnership would make annual evaluations of the partners and would truthfully advise the employee partner of the results of those evaluations.

f) That partners would only suffer involuntary withdrawal from the partnership if the partner was in fact prejudicial to the practice or reputation of the partnership, only after the partner had received a formal termination notice specifying the reasons for the action taken and upon a reasonable opportunity for review of such termination notice by the Policy Board of the Main Hurdman partnership.

8. In reliance upon the representations and assurances from the Defendant described above, Plaintiff accepted the offer of employment with Defendant, Main Hurdman and thereafter continued in the employ of the partnership as a Certified Public Accountant from 1973 until her discharge in September of 1983.

9. From her original employment by Hurdman & Cranstoun in 1973 until April of 1982, Plaintiff was employed variously as a staff accountant, senior accountant, supervisor, and manager of the Defendant firm. From April 1982 until her discharge in September of 1983, Plaintiff was employed by the Defendant partnership as a partner CPA in the firm.

10. Throughout Plaintiff's employment by the Defendant partnership and continuing as recently as her evaluation dated March 31, 1983, Plaintiff's performance appraisals and statements of accountability (otherwise referred to as annual evaluations) were satisfactory. Plaintiff was never told by the partnership or its authorized agents as a part of its evaluation process that her work

was in any respect unsatisfactory or that she had failed to perform professionally at the expected level of a partner within the partnership. Plaintiff alleges on information and belief that her productivity measured in terms of client billings, billable hours, and clients managed, was at all times equal to or exceeded that of some other CPA's employed by Main Hurdman and assigned similar duties and responsibilities to those of the Plaintiff.

11. On or about September, 1982 the National Policy Board of Main Hurdman announced that it was necessary to cut back the number of partners in Main Hurdman in comparison to staff employees. At the time this policy decision was announced, Plaintiff was one of six female partners out of a total national partnership of in excess of 500 partners. On or about April 20, 1983, with no indication of dissatisfaction with her work or performance, Plaintiff was informed by Richard West, the Partner in Charge of the Denver office of Main Hurdman, that she was to be terminated effective September 30, 1983. Following the announced termination of Plaintiff by the Partner in Charge, Plaintiff's client load was reduced and her work was assigned to a new male partner who had been transferred into the Tax Department for the express purpose of taking over her work load. This partner was transferred after Plaintiff was informed that she was to be terminated, however, Plaintiff has been subsequently informed and Plaintiff alleges on information and belief that this partner purchased a house in the Denver area in January 1983 prior to the time Plaintiff was informed that she was to be terminated. During Plaintiff's tenure with the Defendant partnership as an employee partner, Plaintiff was to receive a salary based upon a base draw together with an allocated percentage of the partnership profits based upon points which were awarded to each partner in accordance with the terms of the partnership agreement. One of the factors upon which points were to be awarded to an employee partner was the number of clients who were managed by that employee partner. Upon Plaintiff's becoming a partner of the Defendant firm, Plaintiff was given responsibility to manage clients who were transferred from another male partner, however, credit for managing those clients continued to be awarded to the male partner throughout Plaintiff's tenure with the Defendant firm.

12. The actions of the Defendant partnership in terminating the Plaintiff, in failing to award Plaintiff points within the partnership for clients managed and in reassigning the Plaintiff's work load were not based upon any objective criteria or documented deficiencies in the professional quality of the Plaintiff's work, which was at least equal to that of some of the male CPA partners during the time Plaintiff was an employee partner.

13. The actions of the Defendant in terminating Plaintiff, in failing to award her points in accordance with the number of clients managed and in reassigning her work load to a newly transferred male partner, constituted unlawful acts of discrimination against the Plaintiff because of her sex in violation of Title VII of the Civil Rights Act of 1964 and were in furtherance of established discriminatory custom, practice and policy of Defendant, Main Hurdman, which is resulted in a total or six women partners out of a total partnership of an excess of 500; in the alternative, the actions of the Defendant constitute the application to women Certified Public Accountants as a class and to the Plaintiff in particular of higher standards for performance and accountability within the partnership than Main Hurdman has required of male CPA employee partners.

14. Defendant has unlawfully and in violation of 42 USC 2000(e)-2(a)(1), 2000(e)-2(a)(2) and 2000(e)-3:

a). Discriminated against Plaintiff in terms, conditions, privileges, opportunities and compensation of her employment on account of her female sex;

b). Limited, segregated and classified her in ways in which deprived and tended to deprive her of employment opportunities and otherwise adversely effected her status as an employee on account of her sex.

15. Without limiting the generality of the foregoing allegations the unlawful actions of sex discrimination by Defendant against Plaintiff have been accomplished by the following and other circumstances:

a). Defendant terminated Plaintiff on September 30, 1983 despite her having performed all lawful and necessary requirements

for maintaining her status as a employee partner of Defendant partnership;

b). Defendant failed and refused to award Plaintiff points and give Plaintiff salary on equal terms and conditions as those which Defendant used to award salary and points to male CPA employee partners.

c). Defendant failed and refused to give Plaintiff work assignments that would contribute to her career advancement;

d). To the extent that lawful and necessary criteria were used, Defendant failed and refused to evaluate Plaintiff's performance in the same manner that Defendant evaluated the performance of its male employee partners;

e). Defendant set and applied standards for female CPA employee partners which adversely impacted female CPA's as a class (including Plaintiff) and which were not justified and are not justified by any business necessity or job relatedness;

f). Defendant set and applied standards for Plaintiff as a female which were not applied to at least some of her male peers; and

g). To the best of Plaintiff's knowledge Defendant failed to take adequate affirmative action to eradicate the present effects of past and current discrimination practiced by the Defendant CPA firm against female CPA's generally and to create a work environment which is at least equally conducive to the progress of female Certified Public Accountants toward partnership as Defendant provided for male Certified Public Accountants.

16. On January 16, 1984, Plaintiff filed a timely charge of discrimination to the Equal Employment Commission (EEOC) regarding the matters complained of herein. A true and correct copy which is attached hereto as Exhibit A and is incorporated herein by reference.

a). On October 22, 1984, the EEOC issued a notice of Right to Sue to Plaintiff, a true and correct copy of which is attached hereto as Exhibit B and is incorporated herein by reference.

b). This action has been instituted within the time prescribed by law.

17. Plaintiff has been severely damaged professionally, emotionally and monetarily as a direct result of the unlawful acts of discrimination of Defendant for which she can only be partially compensated in an action at law for damages.

WHEREFORE, Plaintiff respectfully prays that this Court:

a) declare illegal the actions of Defendant toward Plaintiff as described in Plaintiff's First Claim for Relief and to declare those actions to be violative of Title VII of the Civil Rights Act of 1964;

b) award Plaintiff back-pay and additional compensation from April 1982 (or such other date as the Court may determine acts of discrimination in employment or acts of discrimination in compensation to have occurred) until the date of entry of judgement herein;

c) award Plaintiff compensation for her future loss of earnings as a result of Defendants unlawful acts in lieu of reinstatement and promotion to partnership;

d) award Plaintiff reasonable attorney's fees, costs and expenses; and

e) grant Plaintiff such other and further relief as may be just and proper in the premises, including, but not limited to, a permanent injunction against further acts of disparagement and discrimination by Defendant by reason of her sex or exercise of right granted by Title VII.

SECOND CLAIM FOR RELIEF

18. Plaintiff hereby incorporates by reference the allegations of Paragraphs 1 through 17 as allegations of this paragraph 18 of the Second Claim for Relief of the Complaint.

19. On information and belief, Plaintiff avers that Defendant has wilfully discriminated in the payment of compensation on the basis of sex between Plaintiff and male Certified Public Accountants employed by the Defendant in violation of the provisions of the Equal Pay Act, amendments to the Fair Labor Standards Act, 29 USC Section 206(d)(1).

20. Plaintiff has given her written consent to the filing of this complaint and the verification attached hereto as required by 29 USC Section 216(b).

WHEREFORE, Plaintiff respectfully prays that:

a) The Court declare the Defendants' action with reference to the Plaintiff to have been a wilfull violation of the Equal Pay Act Amendments, 29 USC Section 206(d)(1); and

b) The Court award Plaintiff such damages as she may show by the evidence after Discovery to have been sustained or which she may be otherwise entitled to together with reasonable attorney's fees and costs in conformity of 29 USC Section 216(b).

THIRD CLAIM FOR RELIEF

21. Plaintiff hereby incorporates by reference the allegations of Paragraphs 1 through 20 above as allegations of this paragraph 21 of the Third Claim for Relief of the Complaint.

22. At the time Plaintiff was terminated by Defendant, Plaintiff was 47 years old and had been employed by Defendant, Main Hurdman or its predecessor Hurdman & Cranstoun, for a period in excess of 10 years.

23. On information and belief, the Plaintiff alleges that to the extent that Defendant was not motivated by unlawful sex discrimination in the awarding of compensation and in the termination of Plaintiff, Defendant was motivated by desire to favor younger CPA employee partners who were predicted to have a longer, productive life and employment with the Defendant CPA firm in violation of 29 USC Section 623(a).

24. Plaintiff has filed a charge of unlawful age discrimination with the Equal Employment Opportunity Commission (EEOC) in compliance with this 29 USC Section 626(d) on January 16, 1984.

WHEREFORE, Plaintiff respectfully prays that this Court:

a) declare illegal the actions of Defendant toward Plaintiff as described in the Third Claim for Relief and declare those acts to have been violative of the Age Discrimination in Employment Act of 1967, as amended;

b) award Plaintiff back pay and supplemental compensation from April 1982 or such other court date as the Court may determine, discrimination in compensation first occurred until the date of Entry or Judgement herein;

c) award Plaintiff compensation for her future loss of earnings as a result of the Defendants unlawful acts;

d) award Plaintiff her reasonable attorney's fees, costs and expenses;

e) grant Plaintiff such other and further relief as may be just and proper in the premises, including, but not limited to, a permanent injunction against further acts of disparagement and discrimination by Defendant by reason of Plaintiff's age.

FOURTH CLAIM FOR RELIEF

25. Plaintiff hereby incorporates by reference the allegations of Paragraphs 1 through 24 as allegations of this Paragraph 25 of Plaintiff's Fourth Claim for Relief of the Complaint.

26. Defendant has breached the terms and conditions of its contract of employment with Plaintiff, which was fully performed on the part of Plaintiff.

27. Because of Defendants breach of contract, Plaintiff has been damaged in an amount which Plaintiff believes will substantially exceed One Million Five Hundred Thousand Dollars ($1,500,000.00).

WHEREFORE, Plaintiff respectfully prays that she have and recover judgement under the Fourth Claim for Relief for her complaint for the amount of damages as she may be shown by the evidence to have sustained as a result of the Defendant's breach of contract, the costs of this action, attorney's fees and such other and further relief as may be just.

TRIAL TO A JURY IS DEMANDED AS TO ALL ISSUES.

Respectfully submitted this _____day of_____, 1985 in Denver, Colorado by:

MARK P. FIELD, #10480
899 Logan Street, #203
Denver, CO 80203-3154
(303) 861-8484

TIM CORRELL, #4667
899 Logan Street, #203
Denver, CO 80203-3154
(303) 861-8484

[Exhibits to Appendix 3 are omitted.]

AFFIDAVIT OF RICHARD L. WEST

STATE OF COLORADO)
) SS:
COUNTY OF DENVER)

BEFORE me, the undersigned authority, a notary public in and for the State and County aforesaid, personally appeared RICHARD L. WEST. who, being duly sworn according to law, deposes and states as follows:

1. My name is Richard L. West. I am Partner in Charge of the Denver Office of Main Hurdman. The Firm of Main Hurdman is a partnership of certified public accountants practicing on a nationwide basis.

2. Marilyn L. Wheeler, who had been employed as an accountant by Main Hurdman and its predecessor Hurdman & Cranstoun since 1973, was elected to partnership in Main Hurdman, effective April 1, 1982.

3. Marilyn Wheeler's election to partnership in Main Hurdman resulted in significant changes in her relationship to the Firm, including the following:

a. she entered into the Firm's Partnership Agreement;

b. she no longer was paid a fixed salary, but was now entitled to a stated share of the Firm's net income;

c. she now had to pay for such benefits as health and life insurance, which had been paid for by the Firm when she had been an employee;

d. she became a part-owner in the Firm by making a capital contribution upon her election to partnership;

e. she had the right to vote, on the same basis as all other partners of the Firm, on such matters as:

(1) amendment of the Partnership Agreement;

(2) approval of mergers with other accounting firms of a certain size;

(3) admission of new partners;
(4) termination of a partner's interest;
(5) approval of draws, shares of net profits, special distributions, and any other income to be allocated to any partners; and
(6) dissolution of the Firm;

f. she became eligible to exercise certain rights and prerequisites which were only enjoyed by partners of the Firm, such as the right to sign audit reports and tax returns, and the right to be reimbursed for membership dues in certain clubs;

g. she became liable for the debts and obligations of the Firm;

h. she was subject to involuntary termination of her interest in the partnership only by either: (1) a unanimous vote of the Firm's Policy Board, or (2) an affirmative vote of no less that 75 percent of the members of the Firm's Advisory Board, or (3) an affirmative vote of no less than 75 percent of all Firm partners casting votes.

4. Marilyn Wheeler voluntarily withdrew from the Firm, effective September 30, 1983. The terms of her withdrawal are set forth in a letter dated May 24, 1983, which was prepared by Ms. Wheeler, and which was jointly executed by me and Ms. Wheeler.

_____

Richard L. West

Sworn to and subscribed before me
this 25th day of February 1985.

_____

Notary Public

May 24, 1983

Mr. Richard West
Main Hurdman
Denver, Colorado

Dear Mr. West:

The following outlines my understanding of the financial terms we discussed in last week's meeting.

1. I will receive a partner's monthly draw of $2,500 plus an additional $1,000 monthly for the period from April 1, 1983 through September, 1983, the date of my withdrawal from the partnership. I will receive an additional $2,500 in cash in October, 1983.
2. I will be present in the Main Hurdman office through July 31, 1983 except for: time spent in employment interviews and counseling; ASWA-ASWCPA National Spring Conference; and June 30 - July 8 which is a previously arranged vacation time.
3. I will be available for consultation on client matters through the time of my termination at the end of September, to the extent this consultation does not interfere with my employment search and opportunities.
4. My partner's capital account will be withdrawn as follows:
   A. $10,000 on June 15, 1983
   B. $5,000 on August 15, 1983
   C. The balance, to the extent determinable, on September 30, 1983.
   D. Any remaining balance by twelve months from the September 30 date of termination.

If our understanding is mutual, please sign a copy of this letter and return it to me.

Very truly yours,

Marilyn L. Wheeler

MLW:sb

_____

Richard L. West, Partner in Charge

AFFIDAVIT OF MARILYN WHEELER

Marilyn Wheeler, of lawful age and being duly sworn deposes and states:

1. In April of 1982 I was presented with a partnership agreement by Defendant, Main Hurdman. In addition to the partnership agreement I went through a "new partner orientation". I had previously received a Policies and Procedures Manual.

2. I have reviewed the Partnership Agreement, the new partner orientation documents and the Policy and Procedures Manual. This Affidavit is based upon the information I received in the course of my orientation as a partner of Main Hurdman.

3. At the time I became a "partner" Main Hurdman had 502 partners. 3570 total personnel and 80 offices nationwide. Counting me, Main Hurdman had six female partners. Counting me, two female partners were terminated in 1983. In 1983, six female partners at Main Hurdman held the following management positions:

Managing Partner/CEO	0
Member of National Policy Board	0
Members of Nominating Committee	1
Members of Advisory Board	0
Regional Partners in Charge	0
Local Partners in Charge	0
Local Department Heads	1

Essentially the duties of *all* the female "partners" at Main Hurdman were the same duties as were performed by non-"partner" staff-employees. (See paragraph 12 below)

4. Main Hurdman's Management is highly centralized with management decision resting in the hand of a Managing Partner/CEO, a National Policy Board, and a National Nominating Committee. Each partner is entitled to vote at an Annual Meeting or at Special Meeting (as called either by the Managing Partner or by members of the National Policy Board.) Individual Partners can

call Special Meetings only upon the aggregation of twenty percent (20%) of the total partnership. An organizational diagram which was part of my orientation is attached as Exhibit 1.

5. Votes at annual or special meetings by partners are primarily for purposes of ratifying decisions which have been made by the Managing Partner, the Policy Board, or the Nominating Committee.

6. Membership in the Nominating Committee and Policy Board are essentially self-perpetuating in that election to either the Policy Board or the Nominating Committee generally is the result of a nomination made by the Nominating Committee.

7. The Managing Partner/Chief Executive Officer is nominated by a "Special Nominating Committee" who are elected from candidates who have been designated by the Policy Board. The Managing Partner is then elected at the Annual Meeting.

8. Day to day affairs of the partnership are handled by the Managing Partner/CEO and his designates in the field consisting of regional partners in charge and a local partner in charge for each local office.

9. The local partner in charge in the Denver office at the time of my termination as a "partner" of Main Hurdman was Richard West.

10. The partner in charge of any local office has responsibility for carrying out the national directives of the Managing Partner/CEO of the firm and has complete discretion and complete control over:

Annual Budgeting for each local office.

Assignment of department heads within the office.

Allocation of partner credit for client hours managed.

Establishing annual performance goals for each employee of the firm—including *ad argumentum*—each partner of the firm.

Final approval of employment of new personnel at all levels within the local office.

Which clients any given CPA or non-CPA staff member employed by the firm will work for.

The amount to be charged for the services of any CPA or non-CPA staff member of the firm.

The hours, dates and places when and where the work is to be performed by the CPA or non-CPA staff member of the firm.

11. In addition to all of the foregoing items, the local partner in charge has direct control over the amount of compensation to be paid not only to non-"partner" members of the firm but also to "partners". Compensation to "partners" is made in the form of a guaranteed draw plus an allocation of the profits of the firm. The allocation is made through a complicated process of points, which may be summarized as follows: The Managing Partner/CEO with the approval of the National Policy Board allocates points among the various offices and/or profit centers. This gross allocation among different locales is ratified by the votes of the partners at the annual meeting. Points distributed to a particular region and/or office or profit center within that region are then allocated to the individual partners by the partner in charge of that region or local office. This decision is not reviewed by the partners themselves and is not voted upon by the partners themselves. In the allocation of such points, credit is supposed to be given to an individual partner based upon the number of clients he or she has "managed". During my tenure as a partner I managed a number of clients within the tax department for whom credit was given to male partners and for whom I received no points and no compensation allocation. This was done by the Managing Partner in charge of the Denver office, who at that time was Richard West.

12. Immediately prior to the time I became a partner at Main Hurdman the Denver office had one tax partner who was the department head and who supervised my work. After I became a partner, there were two partners in the tax department, counting me. The other tax partner was the department head and who supervised my work. My client responsibilities were not substantially changed upon becoming a partner. I had the same duties and responsibilities as before I became a partner. I had the same client load and the same support staff as before.

Becoming a "partner" was simply the next promotional step in a CPA career which began as staff accountant ten years before and progressed through the titles, "Senior Accountant", "Supervisor", and "Manager" to "Partner". On promotion to

"Partner", I was performing the same services for the clients under the same supervisors.

13. I have reviewed the Affidavit of Richard L. West accompanying the Defendant's Motion to Dismiss. While Mr. West's statements are generally correct with regard to the execution and content of the Partnership Agreement some are false. As a non-"partner" manager at Main Hurdman I did sign tax returns (I was not in the audit department) and my Petroleum Club monthly dues were paid by Main Hurdman

Certain additional information is necessary to make other comments of Mr. West not misleading. While it is true that I made a capital contribution of approximately $4,000.00 to the Main Hurdman capital account. Capital accounts at the time I became a partner totaled $68,409,000.00. My share of the capital account amounted to .000058.

14. While it is correct that a internal appeal process of an involuntary termination exists within the Partnership Agreement as described by Mr. West, during my experience with Main Hurdman both as a staff member and as a partner for a period in excess of 10 years, I am not aware of any occasion where the National Policy Board did not ratify and approve the actions of the local managing partner in charge. Inasmuch as the local managing partner in charge had total control over allocation of work flow, assignment of clients, places, hours and duties of work to be performed, any opposition to the decision by the partner in charge with regard to an involuntary termination was considered to be futile.

Prior to my termination another "partner" in the Main Hurdman Denver office had been requested to leave by the local Partner in Charge. This earlier terminated "partner" upon making inquiry of some of the National Policy Board members also determined that any appeal right was meaningless. I am informed of the cases of two or three other involuntary terminated partners who came to the same conclusion.

15. The exhibit attached to Mr. West's Affidavit, my letter of May 24, 1984, should be reviewed for its content. It specifically does not address the question whether or not my termination was voluntary or involuntary, but simply sets forth the financial terms upon which my departure from the firm were to take place. As Mr.

West is well aware, he tendered to me an agreement which indicated that any departure was "voluntary". I refused to sign it. At trial, independent third party witnesses will be produced to verify that my departure from the firm was involuntary.

16. Throughout my ten years employment with Main Hurdman, including my tenure as a partner, Main Hurdman maintained personnel files for all personnel which included, *inter alia*, an original application, academic transcripts, references, salary histories, employee reviews, performance evaluations, records pertaining to certificates to practice as a Certified Public Accountant, and continuing professional education records.

Further the affiant saith not.

_____

Marilyn Wheeler

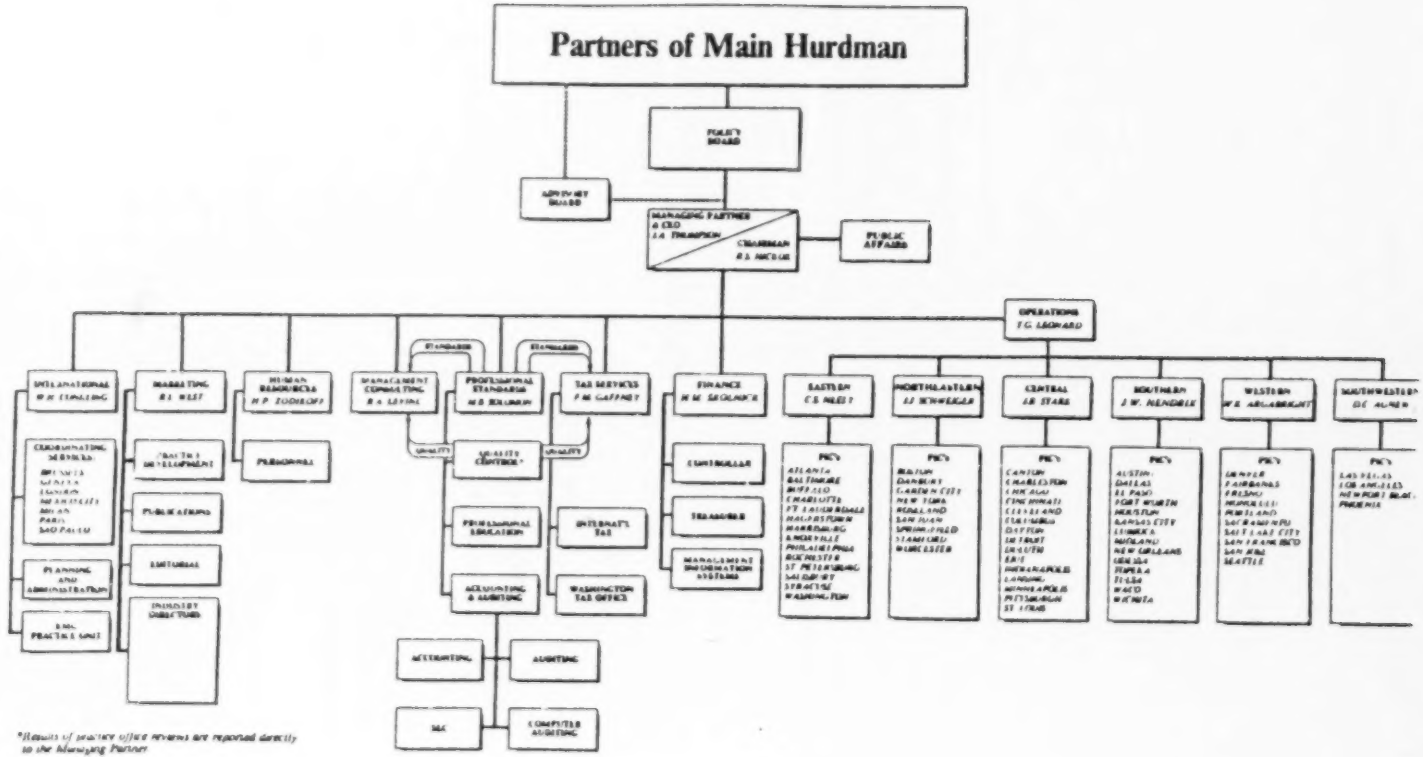
STATE OF COLORADO)
) SS:
COUNTY OF DENVER)

Subscribed and sworn to before me this 11th day of March, 1985.

Witness my hand and official seal_____

Notary Public

My commission expires_____



*Results of practice office reviews are reported directly to the Managing Partner

(P-3)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

NO._____

CERTIFICATE OF MAILING

MARILYN WHEELER, Petitioner,

v.

MAIN HURDMAN, Respondent.

I hereby certify that on this 21 day of October, 1987, three true and correct copies of the foregoing Petition for a Writ of Certiorari were duly served on the persons identified below by placing same in the United States mail, first class postage prepaid and properly addressed to the following:

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Alison G. Rona, Esq.
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Johnny J. Butler, Esq.
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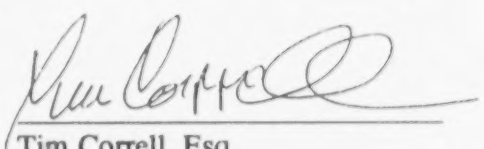

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